

No. 15186

United States
Court of Appeals
for the Ninth Circuit

JENNIE R. DUFF and ELIZABETH BRON-
SON, Appellants,
vs.
H. L. PAGE, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Nevada

FILED

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PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, in and
for the District of Nevada, Northern Division

No. 1217

JOHN A. DUFF, JENNIE R. DUFF, his wife,
and ELIZABETH BRONSON, Plaintiffs,

vs.

H. L. PAGE, Defendant.

COMPLAINT FOR DAMAGES

First Cause of Action

Comes now the plaintiff, John A. Duff, and for
cause of action against the defendant alleges:

I.

That at all times herein mentioned, the plaintiffs,
John A. Duff and Jennie R. Duff, his wife, were
and still are citizens of the State of Idaho; that at
all times herein mentioned, the plaintiff, Elizabeth
Bronson, was and still is a citizen of the State of
California; that at all times herein mentioned, the
defendant was and still is a citizen of the County of
Elko, State of Nevada.

II.

That at all times herein mentioned that certain
highway known as U. S. 40 approximately fourteen
miles west of the City of Wells, County of Elko,
State of Nevada, was and still is a public highway
situated in the County of Elko, State of Nevada,
and at [2] said point, said highway runs approxi-
mately East and West.

III.

That on December 31, 1954, at about 10:00 a.m., plaintiff, John A. Duff, was driving, and plaintiffs Jennie R. Duff and Elizabeth Bronson were riding in, a certain 1955 De Soto Sedan Automobile in a westerly direction on said U. S. Highway 40, approximately fourteen miles west of the City of Wells, County of Elko, State of Nevada; that at the said time and place, the defendant, H. L. Page, so negligently operated, controlled, maintained and parked without any flares, flagman or other warning, his 1941 Studebaker wrecker truck on the northerly improved portion of the said U. S. Highway 40, so as to proximately cause the said 1955 De Soto Sedan Automobile to forcibly strike and collide with the said 1941 Studebaker wrecker truck.

IV.

That as a proximate result of the negligence, as aforesaid, of defendant, the plaintiff, John A. Duff, was severely injured about his body, limbs and head and received a concussion, abrasions about his head, contusion of his left thigh, fracture of the third, fourth and fifth ribs on the left side of his chest with subcutaneous emphysema, and shock to his nervous system, severe pain and suffering, all to his general damages in the sum of Five Thousand and No/100 Dollars (\$5,000.00). That said damages are permanent in character.

V.

That as a proximate result of the negligence, as

aforesaid, of the defendant, the plaintiff, John A. Duff, incurred the following special damages for the purposes indicated after each item, to wit:

Expense and Purpose	Amount
Loss of earnings to date	\$1,360.00
Elko Clinic, medical treatment	80.00
Elko County General Hospital, hospital treatment	215.60
Ambulance to hospital from scene of accident	
One pair of glasses	46.00
(Also future medical care and attention and loss of earnings to be inserted later.)	
Total	<hr/> \$1,701.60

VI.

That as a proximate result of the negligence, as aforesaid, of the defendant, the said 1955 De Soto Sedan, owned by this plaintiff, was damaged in the sum of Three Thousand One Hundred Fifty-one and 70/100 Dollars (\$3,151.70).

VII.

That the plaintiff, Jennie R. Duff, was severely injured as a proximate result of the negligence, as aforesaid, of the defendant, and by reason thereof, plaintiff, John A. Duff, has lost her consortium and services, all to his damage in the sum of Two Thousand and No/100 Dollars (\$2,000.00).

Wherefore, plaintiff, John A. Duff, prays Judgment against the defendant in the sum of Five

Thousand and No/100 Dollars (\$5,000.00), and special damages in the sum of Four Thousand Eight Hundred Fifty-three and 30/100 Dollars (\$4,853.30), together with his costs of suit incurred herein.

Second Cause of Action

Comes now the plaintiff, Jennie R. Duff, and for cause of action against the defendant, alleges:

I.

The plaintiff hereby refers to Paragraphs I, II and III of the First Cause of Action, and incorporates the same herein as though set forth in full herein.

II.

That as a proximate result of the negligence, as aforesaid, [4] of the defendant, the plaintiff, Jennie R. Duff, was severely injured about her body, limbs and head and received a concussion, fracture of the second, third and fourth ribs on her left side, a compression fracture of the seventh vertebrae, a fracture with depression of the sternum, a laceration of her knee, hemathorax bilateral due to trauma, laceration of the forehead with numerous stitches, severe shock to her nervous system, pain and suffering, all of which injuries are permanent in character, all to her general damages in the sum of Twenty-five Thousand and No/100 Dollars (\$25,000.00).

III.

That as a proximate result of the negligence, as aforesaid, of the defendant, said plaintiff, Jennie

R. Duff, incurred the following special damages for the purposes indicated after each item, to wit:

Expense and Purpose	Amount
Elko Clinic, medical treatment	\$334.50
Elko County General Hospital, hospital treatment	431.95
X-Rays	15.00
	<hr/>
Total	\$781.45

IV.

Plaintiff will need further medical care, drugs, medicine and attention, and when she ascertains the amounts thereof, she prays that she be allowed to insert the same herein.

Wherefore, Plaintiff, Jennie R. Duff, prays Judgment against the defendant in the sum of Twenty-five and No/100 Dollars (\$25,000.00), and special damages in the sum of Seven Hundred Eighty-one and 45/100 Dollars (\$781.45), together with her costs incurred herein.

Third Cause of Action

Comes now the plaintiff, Elizabeth Bronson, and for cause [5] of action against the defendant, alleges:

I.

The plaintiff hereby refers to Paragraphs I, II and III of the First Cause of Action and incorporates the same herein as though set forth in full herein.

II.

That as a proximate result of the negligence, as

aforesaid, of the defendant, the plaintiff, Elizabeth Bronson, was severely injured about her body, limbs and head and received a concussion, fracture of the sixth, seventh and eighth ribs on her left side, acromio-clavicular dislocation on the left side, a traumatic hematoma of her face, severe pain, suffering, shock to her nervous system, all of which injuries are permanent in character, all to her general damages in the sum of Twenty-five Thousand and No/100 Dollars (\$25,000.00).

III.

That as a proximate cause of the negligence, as aforesaid, of the defendant, said plaintiff incurred the following special damages for the purposes indicated after each item, to wit:

Expense and Purpose	Amount
Elko Clinic, medical treatment	\$217.00
Elko County General Hospital, hospital treatment	393.95
Loss of earnings at \$15.00 per week	210.00
Dr. Brockbank, medical care	25.00
Dr. Grover, medical care	10.00
Dr. Lee, medical care	3.00
	<hr/>
Total to date	\$858.95

IV.

That plaintiff is informed and believes that she will need further medical care and attention and will lose further earnings, and when she ascertains

the amounts thereof, she prays that she be allowed to insert the same herein.

Wherefore, plaintiff prays Judgment against defendant in [6] the sum of Twenty-five Thousand and No/100 Dollars (\$25,000.00), and special damages in the sum of Eight Hundred Fifty-eight and 95/100 Dollars (\$858.95), to date and such special damages hereafter suffered, together with her costs of suit incurred.

Dated this 7th day of April, 1955.

WRIGHT & EARDLEY,
/s/ By GEORGE F. WRIGHT,
Attorneys for Plaintiffs.

/s/ By HERMAN E. BEDKE,
Of Counsel.

Demand is hereby made for a jury trial.

WRIGHT & EARDLEY,
/s/ By GEORGE F. WRIGHT,
Attorneys for Plaintiffs. [7]

[Endorsed]: Filed April 8, 1955.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM

Answering plaintiffs' complaint, defendant above named admits, denies and alleges as follows:

Answering the First Claim For Relief of plaintiff, John A. Duff:

First Defense

Defendant admits the allegations contained in

Paragraphs I and II, and denies each and every other allegation contained in the first claim for relief of John A. Duff.

Second Defense

Whatever injuries and damages were sustained by the plaintiff as a result of the accident as alleged in the first claim for relief herein were caused in whole or in part by or were contributed [8] to by reason of the negligence, carelessness, recklessness and misconduct of the plaintiff in that plaintiff was operating his 1955 De Soto automobile in a grossly negligent and reckless manner at the time that same collided with defendant's 1941 Studebaker wrecker truck, that said plaintiff was driving said automobile at an excessive and dangerous rate of speed, that defendant's vehicle was stationary and visibility was good with sunshine weather existing at the time of the accident, that the road was in a good and safe drivable condition; that plaintiff's view was unobstructed for a distance of 2,710 feet from the point of impact, that plaintiff failed to heed the red light blinker signal of the defendant and drove into and struck defendant's vehicle in defiance of said signal, and that this negligence on the part of the plaintiff contributed to and proximately caused the alleged injuries and damages to the plaintiff.

Third Defense

That at the time and place of said accident as alleged in the first claim for relief, the plaintiff, John A. Duff, then and there saw, or by the exercise of

reasonable care could have seen, defendant in a position of imminent peril in time, by the exercise of ordinary care without injury to himself or others, to have slackened the speed of said automobile or stopped it or turned it aside and avoided collision with defendant and the consequent injury, but the plaintiff failed so to do, and failed to take any care or caution to avoid or prevent collision with defendant after having the last clear chance so to do.

Fourth Defense

Whatever injuries and damages were sustained by plaintiff as alleged in the first claim for relief were a result of a course of circumstances beyond the control of the defendant, and were unavoidable so far as defendant was concerned. [9]

Answering the Second Claim For Relief of plaintiff, Jennie R. Duff:

First Defense

Defendant admits, denies and alleges in answer to Paragraph I of the second claim for relief in the same manner as herein answered in answer to Paragraphs I, II and III of the first claim for relief and incorporates said answers as though set forth in haec verba; and denies each and every other allegation contained in the second claim for relief.

Second Defense

Whatever injuries and damages were sustained by plaintiff, Jennie R. Duff, as the result of the accident as alleged in the complaint herein, were caused in whole or in part or were contributed to

by the negligence of plaintiff in that she continued to allow her husband, John A. Duff, to drive at an excessive rate of speed when she had notice and knowledge of her husband's impaired vision, advanced age, driving habits, and that he had been driving in such a manner and for such a period of time that she should have realized he could not conduct himself as a reasonable and prudent person should, and that by virtue thereof the said plaintiff, Jennie R. Duff, was negligent in such a manner as to be the cause of or contribute to any injuries she may have suffered; that said plaintiff could have avoided any and all damages she may have sustained had she exercised reasonable care of her own person by insisting that her husband not drive at all or at least refrain from driving at an excessive rate of speed and in a careless and reckless manner in view of the circumstance then obtaining.

Third Defense

Whatever injuries and damages were suffered by the plaintiff, Jennie R. Duff, as a result of the accident as alleged in the complaint were not suffered as a result of the negligence of defendant, H. L. Page, but were caused wholly by the negligence of her [10] husband, John A. Duff, a third person over whom defendant had no control or supervision and for whose acts defendant was not responsible, or partly by the negligence of the coplaintiff husband and the contributory negligence of the plaintiff, and said negligence on the part of the coplaintiff driver was the sole proximate cause of the in-

jury, without any negligence on the part of the defendant.

Fourth Defense

If defendant were negligent in any manner or means as alleged in the complaint, said alleged negligence was not the proximate cause of plaintiff's injuries and damages, but said alleged injuries and damages were proximately caused by the negligence of her husband, John A. Duff, or partly by the negligence of said coplaintiff with the contributory negligence of plaintiff.

Fifth Defense

That at the time and place of said accident, plaintiff, John A. Duff, her husband, then and there saw, or by the exercise of reasonable care could have seen, the position of immediate peril of the defendant and by the exercise of reasonable care and prudence the said coplaintiff husband had the last clear chance of avoiding said accident so that the proximate cause of any damages or injuries sustained by plaintiff wife, Jennie R. Duff, was the result of the inattentiveness of her husband to discover the known danger and said damages or injuries were not proximately caused by any negligence on the part of the defendant.

Sixth Defense

Whatever injuries and damages were sustained by plaintiff, Jennie R. Duff, as alleged in the second claim for relief, were a result of a course of circumstances beyond the control of the defendant, and were unavoidable so far as defendant was concerned.

Answering the Third Claim for Relief of plaintiff, Elizabeth Bronson: [11]

First Defense

Defendant admits, denies and alleges in answer to Paragraph I of the third claim for relief in the same manner as herein answered in answer to Paragraphs I, II and III of the first claim for relief and incorporates said answers as though set forth in haec verba; and denies each and every other allegation contained in the third claim for relief.

Second Defense

Whatever injuries and damages were sustained by plaintiff, Elizabeth Bronson, as a result of the accident as alleged in the complaint herein, were caused in whole or in part or were contributed to by the negligence of plaintiff in that she continued to allow the driver, John A. Duff, to drive at an excessive rate of speed when she had notice and knowledge of the driver's impaired vision, advanced age, driving habits, and that he had been driving in such a manner and for such a period of time that she should have realized he could not conduct himself as a reasonable and prudent person should, and that by virtue thereof the said plaintiff, Elizabeth Bronson, was negligent in such a manner as to be the cause of or contribute to any injuries she may have suffered; that said plaintiff could have avoided any and all damages she may have sustained had she exercised reasonable care of her own person by insisting that the driver not drive at all or at least refrain from driving at an excessive rate of speed

and in a careless and reckless manner in view of the circumstance then obtaining.

Third Defense

Whatever injuries and damages were suffered by the plaintiff, Elizabeth Bronson, as a result of the accident as alleged in the complaint were not suffered as a result of the negligence of defendant, H. L. Page, but were caused wholly by the negligence of the driver, John A. Duff, a third person over whom defendant had no control or supervision and for whose acts defendant was not [12] responsible, or partly by the negligence of the complaintiff husband and the contributory negligence of the plaintiff, and said negligence on the part of the complaintiff driver was the sole proximate cause of the injury, without any negligence on the part of the defendant.

Fourth Defense

If defendant were negligent in any manner or means as alleged in the complaint, said alleged negligence was not the proximate cause of plaintiff's injuries and damages, but said alleged injuries and damages were proximately caused by the negligence of the driver, John A. Duff, or partly by the negligence of said complaintiff with the contributory negligence of plaintiff.

Fifth Defense

That at the time and place of said accident, plaintiff, John A. Duff, the driver, then and there saw, or by the exercise of reasonable care could have seen, the position of immediate peril of the defend-

ant and by the exercise of reasonable care and prudence the said coplaintiff driver had the last clear chance of avoiding said accident so that the proximate cause of any damages or injuries sustained by plaintiff guest, Elizabeth Bronson, was the result of the inattentiveness of the driver to discover the known danger and said damages or injuries were not proximately caused by any negligence on the part of the defendant.

Sixth Defense

Whatever injuries and damages were sustained by plaintiff, Elizabeth Bronson, as alleged in the third claim for relief, were a result of a course of circumstances beyond the control of the defendant, and were unavoidable so far as defendant was concerned.

Counterclaim

Comes now, H. L. Page, defendant above named, and by way of counterclaim against plaintiff, John A. Duff, alleges as follows:

I.

Defendant is a citizen of the State of Nevada and plaintiff [13] is a citizen of the State of Idaho. The amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

II.

On the 31st day of December, 1954, defendant, as owner and operator of the Page Garage at Wells, Nevada, was called upon to assist in extricating an automobile and trailer owned and operated by one Glen R. Shaw from a snowbank on the north side

of a public highway, called United States Highway number 40, at a point approximately fourteen miles west of Wells, Nevada. In performing said task, defendant had placed his 1941 Studebaker wrecker truck at about a twenty degree angle across the westbound lane of traffic, with the left wheel of said vehicle off the paved surface of said highway and the right wheel on the very edge of said paved surface, thus placing the rear end of the wrecker within approximately eighteen inches of the overturned trailer, leaving at least twenty feet of travelable road surface between the front of the wrecker and the nearest obstruction on the south edge of said highway. That at all times the defendant and his assistant, Clifford N. Eldon, were performing their functions in a safe, prudent and reasonable manner in that the red blinker light on the truck was in operation, they had personally flagged numerous automobiles traveling in either direction past the scene of the operations, and were performing said operations in the only possible and reasonable manner in the ordinary and usual course of extricating and towing damaged vehicles. That at the time the weather was clear with only a slight overcast and visibility was good along a straight stretch of the said highway to the east for a distance of approximately 2,710 feet. The said highway was wet and slushy but in a safe drivable condition for those traveling at a moderate rate of speed. [14]

III.

That at said time and said place, at about 10

o'clock a.m., a certain 1955 DeSoto Sedan automobile driven by the said plaintiff, John A. Duff, came down said highway at a reckless and highly dangerous rate of speed, in excess of seventy miles per hour, in view of the circumstances and the then existing highway conditions, traveling in a westerly direction down the right side of said highway. That the said plaintiff drove the entire 2,710 feet from the top of the knoll to the scene of the accident at said reckless and excessive rate of speed, without materially slackening the speed at which said automobile was traveling, in a straight path down said northern side of the highway to a point approximately six feet away from the location where defendant's wrecker was parked, at which point the said plaintiff turned his automobile sharply to the right and struck and collided with the left side of said wrecker behind the cab knocking said wrecker sixty-two feet in a southwest direction. That the brakes on said wrecked had been set with two thousand pounds pressure and the red warning light was still in operation after the accident. That shortly before said collision, the defendant had been directing traffic and had looked east and no cars were in sight. That defendant had returned to the tow truck and had stepped on the running board on the west side to get a tool from the tool compartment. That plaintiff, John A. Duff, drove upon the scene at such a negligent, reckless and excessive rate of speed that it was impossible to anticipate his approach and defendant could not have avoided being struck by plaintiff no matter what position

his wrecker truck had been placed. That by reason and virtue of plaintiff driving against and striking said tow truck, the defendant was violently thrown approximately twenty feet southwest from the point he was standing and thereby sustained serious injuries to both his person and property. [15]

IV.

That the manner of operation of such automobile by plaintiff, John A. Duff, at the time and place aforesaid, under the circumstances then and there existing, was unlawful, reckless and highly dangerous to the life and limb of defendant and others then and there traveling on said highway, and said plaintiff was grossly negligent in driving at an excessive rate of speed so as to strike an obvious obstacle which should have been seen by plaintiff for as far as a mile away, and which was an obvious danger which plaintiff had, or should have, observed so as to give him the last clear chance of avoiding said collision had he not been operating said automobile in an incompetent, inexperienced, grossly negligent and reckless manner in view of the conditions then existing.

V.

As a direct and proximate result of the collision and striking of said wrecker truck by the plaintiff as alleged, defendant, H. L. Page, was greatly wounded and bruised in and about his head, face and body, suffering abrasions, contusions and an acute hernia to his right side, which will require surgery in the near future by the recommendation

of doctors, and because and by reason of such injuries, defendant suffered a great nervous shock, became sick, sore, lame and disordered and has so remained, and continued and still does so remain and continue up to the present time, during which time said defendant has suffered and does suffer great bodily pain and mental distress, all to his general damage in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), and defendant alleges that the injuries he has sustained will be permanent.

VI.

That as a direct and proximate result of the collision and striking of said wrecker truck by the plaintiff, the defendant, H. L. Page, has had to pay out and become liable for sums of money [16] to repair his wrecker truck and for medical expenses in the following amounts:

Repair of wrecker truck	\$1,140.75
Loss of profit & use of trucker for calls	1,350.00
Medical expenses	28.35
Traveling expenses for medical treat- ments	75.00
Total	<hr/> \$2,594.10

And, defendant will be compelled to spend further sums for medical, hospital and nurses' expenses for a time not now determinable and in amounts not now ascertainable which defendant prays that he be allowed to insert herein at a future time.

Wherefore, defendant prays and demands judgment against plaintiff under this Counterclaim in a general amount of \$7,500.00 and special damages in the sum of \$2,594.10, together with costs and disbursements incurred herein.

Dated: This 2nd day of May, 1955.

PIKE & McLAUGHLIN,
Attorneys for Defendant,
/s/ By JOHN S. McLAUGHLIN,
For the Firm.

Certificate of Mailing attached. [17]

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Plaintiff John A. Duff replies to the counterclaim of the defendant as follows:

I.

Admits Paragraph I of said counterclaim.

II.

Denies each and every, all and singular, of the allegations of Paragraph II, save and except that plaintiff admits the following: Lines 5 to 10, ending with the word "Nevada."

III.

Denies each and every, all and singular, of the allegations of Paragraph III, save and except, that the plaintiff admits the following: Admits that the

plaintiff at said time and place was driving a 1955 DeSoto sedan automobile.

IV.

Denies each and every, all and singular, of the allegations of Paragraph IV.

V.

Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs [18] V and VI of said counterclaim.

First Affirmative Defense

For a first affirmative defense plaintiff alleges as follows:

I.

That on December 31, 1954, at about the hour of 10:00 a.m., the defendant, H. L. Page, so negligently operated, controlled, maintained and parked his 1941 Studebaker wrecker truck, at a point approximately 14 miles west of Wells, County of Elko, State of Nevada, on U. S. Highway 40, a public highway, and in the west bound traffic lane, all without any flares, flagman or other warning, so as so proximately cause a certain 1955 DeSoto sedan automobile driven by the plaintiff at said time and place to strike and collide with the said 1941 Studebaker wrecker truck; that the damages, if any, to the said wrecker truck, and the injuries, if any, sustained by the defendant, H. L. Page, were approximately caused by or contributed to by the negligence, as aforesaid, of the said defendant.

Wherefore, plaintiff, John A. Duff, prays for

damages and costs in accordance with his complaint, and that the defendant, H. L. Page, take nothing by reason of his counterclaim.

Dated this 19th day of May, 1955.

WRIGHT & EARDLEY,
HERMAN BEDKE,
Of Counsel.

GOLDWATER, TABER AND
HILL,

/s/ By HAROLD O. TABER,
Attorneys for Plaintiff. [19]

Acknowledgment of Receipt of Copy Attached. [20]

[Endorsed]: Filed May 20, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above matter came on this 13th day of June, 1955, at the hour of 4:00 o'clock P.M. for pretrial, George Wright, Esq., appearing for all of the plaintiffs, Harold O. Taber, Esq., appearing for the plaintiff John A. Duff, and Miles N. Pike, Esq., and John W. Barrett, Esq., appearing for the defendant.

Jurisdiction

The Court has jurisdiction of this matter on the basis of diversity of citizenship, and the amount sued for exclusive of interest being in excess of \$3,000.00.

Nature of the Case

This is an action based on negligence brought by plaintiffs against the defendant arising out of injuries alleged to have been suffered to plaintiffs by reason of a collision between the automobile owned and operated by the plaintiff, John A. Duff, and an auto wrecker owned by the defendant. Defendant counterclaims for his alleged injuries.

Agreed Facts

At about the hour of 10:00 o'clock A.M., on the 31st day of December, 1954, defendant in the process of removing [23] an automobile and trailer from a snow bank off the north side of Highway 40, at a point approximately fourteen (14) miles west of Wells, Nevada, had his 1941 Studebaker wrecker parked in the north traffic lane of said highway, that being the traffic lane for traffic normally moving west. That the plaintiffs were proceeding west in a 1955 De Soto automobile owned and driven by plaintiff John A. Duff. Plaintiff Jennie R. Duff was the wife of John, and the plaintiff Elizabeth Bronson was a friend accompanying them on the journey. All three plaintiffs were riding in the front seat. There was a straight approach of highway of approximately 0.40 miles from the east, with a slight down grade, toward the parked wrecker; the road was oil surfaced and approximately forty-three (43) wide with a broken white painted center line including about $7\frac{1}{2}$ feet of mixed oil and gravel shoulder on the north side and 8 feet of shoulder on the south side. (See "Stipulations") The day was clear with good visibility.

Plaintiffs' Contentions

Plaintiffs contend that there was snow and slush on the road surface; that there were no proper warnings, signals or markers on or in the immediate vicinity of the parked wrecker; that the wrecker was approximately 17 feet in length and parked almost straight across the west bound traffic lane, with its front end almost to the white center line on the highway, its rear end extending to the beginning of the oil and gravel north shoulder; that plaintiff was driving with due care and applies his brakes at sufficient distance from the wrecker to have stopped under ordinary circumstances but that the snow and slush on the highway caused his car to skid several hundred feet causing it to collide with the wrecker; that the wrecker was parked [24] on the highway illegally and contrary to Section 4365, N.C.L., 1929.

Defendant's Contentions

Defendant contends that he was lawfully parked on the highway and pursuing the business for which he had been summoned, namely, the removal of a car and trailer from a snow bank on the north side of the highway; that a red blinker warning light was mounted on the wrecker and was in full operation; that plaintiffs as they approached had a clear unobstructed view down the highway to the west toward the wrecker of approximately 0.40 of a mile; that the road was wet but presented a safe driving surface; that plaintiff, John A. Duff, was driving the DeSoto in a grossly negligent and reckless man-

ner and at an excessive and dangerous rate of speed; that the collision was due entirely to the negligence of the plaintiffs and that there was no contributory negligence on his part; that the negligence of the plaintiffs was the sole proximate cause of the injuries received by them as a result of the collision.

The Pleadings

(a) The Complaint.

Plaintiffs' complaint makes out three causes of action against defendant for damages resulting from injuries received as a result of the collision based on defendant's negligence, predicated on (1) general negligence, and (2) unlawful parking on the highway. John A. Duff asks for special damages in the amount of \$4,853.30 and general damages in the amount of \$5,000.00; Jennie R. Duff seeks special damages amounting to \$781.45 and general damages amounting to \$25,000.00; the prayer of Elizabeth Bronson is for \$858.95 special damages and \$25,000.00 general damages. All three plaintiffs pray for costs. [25]

(b) The Answer.

Defendant as to each cause of action denies his (1) negligence, and (2) will contend that he was lawfully on the highway. As separate defenses he asserts as to plaintiff, John A. Duff:

2. Contributory negligence on the part of Duff, and that such contributory negligence was the proximate cause of the injuries claimed and damages suffered.

3. That the plaintiff, John A. Duff, saw, or by the exercise of reasonable diligence could have seen, that the defendant was in a position of imminent peril.

4. Unavoidable accident.

As to Jennie R. Duff:

1. General denial of negligence.

2. Contributory negligence on her part.

3. That sole negligence of John A. Duff was proximate cause of collision and injuries, or the concurrent negligence of Duff plus Jennie's contributory negligence, was the sole proximate cause of the collision and injuries.

4. That if defendant was negligent his negligence was not the proximate cause of collision and injuries, but that same was caused by the sole negligence of Duff, or concurring negligence of Duff and contributory negligence on part of Jennie.

5. That her injuries were due to her husband's failure to observe the last clear chance rule.

6. That the accident was unavoidable.

As to Elizabeth Bronson:

The same defenses are made to the Bronson cause of action as to Jennie Duff's cause of action.

(c) Counterclaim.

Defendant, by way of counterclaim against John A. Duff, asserts damages occasioned by the negligence of Duff in the operation of the DeSoto, both to himself and to the wrecker [26] truck, said negligence being based upon (1) Duff driving at an excessive rate of speed, and his (2) failure to observe

the last clear chance rule. Special damages in the amount of \$2,594.10 and general damages in the amount of \$7,500.00 are prayed for. Defendant prays for costs.

(d) Reply to Counterclaim.

By his reply to the counterclaim, John A. Duff, asserts:

1. General denial of negligence.
2. Contributory negligence on part of Duff.

Issues of Law

The issues of law involved in the claims and defenses here presented are: (1) negligence, (2) contributory negligence, (3) last clear chance.

Stipulations

1. It is stipulated that the corrected testimony of the witness Springmeyer, whose deposition has been taken, will be received as to measurements and character of highway and shoulders at point of collision.

2. It is conceded that defendant's defense of last clear chance against John A. Duff has no merit as against Jennie R. Duff and Elizabeth Bronson.

3. The map heretofore prepared by Springmeyer will be received in evidence without foundation, and the conditions thereon depicted are accepted as true.

4. That the depositions of any of the witnesses heretofore taken may be received in evidence.

5. That medical examinations will be taken by the parties of plaintiffs and defendant, and that

such reports will be exchanged between respective counsel.

6. That the following items of special damages were incurred by the respective parties as a result of the collision and are reasonable: [27]

John A. Duff:

Elko Clinic	\$ 80.00
Elko General Hospital.....	215.60
One pair of glasses.....	46.00
<hr/>	
Total	\$ 341.00

Jennie R. Duff:

Elko Clinic	\$ 334.50
Elko General Hospital.....	431.05
<hr/>	
Total	\$ 765.55

Elizabeth Bronson

Elko Clinic	\$ 217.00
Elko General Hospital.....	393.95
H. B. Grover, M.D.	
Vallejo	10.00
Dr. Lee, Vallejo.....	3.00
Dr. Brockbank	25.00
<hr/>	
Total	\$ 648.95

7. It is stipulated that there will be additional items of special damages, and as to these upon the production of receipted statements they will be deemed included with the foregoing particularized items.

8. It is also stipulated that counsel will agree upon the items of special damage incurred and to be incurred by the defendant, Page.

Trial Date

It is indicated that each of the parties will have about six witnesses, in addition to medical testimony of doctors if such testimony be required. No expert witnesses will be offered other than medical. It is estimated that it will take three days to try the case before a jury, and November 7, 8 and 9, 1955, has been fixed for trial.

Order

Pursuant to discussion and stipulation of counsel and on the basis of the pleadings and the foregoing comment, it is Ordered as follows:

1. That the foregoing constitutes the pretrial order [28] in this matter, subject to the right of respective counsel to suggest within ten days from this date any necessary or appropriate changes so as to conform to the pretrial discussion. None Being Offered the Order Will Stand As Final, and in Lieu of the Pleadings. Copies of any proposed changes must be served on counsel for the opposite party who shall have five days from receipt thereof to make and file his consent, or opposition, to such proposed changes, and/or to offer such amendments as deemed proper. It is suggested that counsel confer and agree on changes, reporting to the Court as follows: (1) Changes agreed on; (2) plaintiffs' changes not agreed to by defendant; and (3) defendant's changes not agreed to by plaintiffs.

2. That each of the stipulations above set-out are approved and made a part of this order by reference.

3. That this matter be set for trial before a jury on November 7, 8 and 9, 1955.

Dated at Carson City, Nevada, this 13th day of June, 1955.

/s/ JOHN R. ROSS

United States District Judge. [29]

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause.]

OBJECTIONS TO PRE-TRIAL ORDER

Come Now the plaintiffs and cross-defendant, John A. Duff, and make the following objections to the Pre-Trial Order of the above-entitled Court, filed in the above action on June 16, 1955:

Agreed Facts

The plaintiffs and said cross-defendant accept the said Agreed Facts, save and except on line 12, page 2, the words "slight down grade" are hereby objected to in that the word "slight" should be omitted. The exact grade, according to the map of W. H. Settlemyer, and the enclosed Certificate of W. H. Settlemyer, is a 3.34% grade from the point of the accident and eastward. Therefore, the word "slight" should be omitted.

Plaintiffs' Contentions

The plaintiffs' contentions are correctly shown,

save and except that in line 20 and line 30, page 2, the word "slush" should be changed to the word ice. Also, in line 28, page 2, the word "applies" should be changed to applied. [30]

Stipulations

Under Paragraph I, page 5, the word "Springmeyer" should be changed to Settlemeier.

Dated this 21st day of June, 1955.

HERMAN BEDKE,

Of Counsel.

GOLDWATER, TABER and HILL,
WRIGHT & EARDLEY,

/s/ By GEORGE F. WRIGHT,

Attorneys for Plaintiff and Cross-Defendant, John
A. Duff.

To Whom It May Concern:

This Is To Certify that the grade on U.S. Highway 40, approximately 14 miles west of Wells, Nevada, between Highway Station 248/73 (point where the piece of chrome is shown on the Settlemeier map) to the east on said highway to Highway Station 269/00, was measured by the undersigned, W. H. Settlemeier, on January 7, 1955, and the said grade was a 3.34% up-grade proceeding from a westerly direction to an easterly direction. That the grade between these two Highway Stations was a uniform grade. A 3.34% grade means that there is a rise of 3.34 feet in each 100 feet of distance.

Dated: June 23rd, 1955.

/s/ W. H. SETTLEMEYER,
Surveyor, County of Elko, State of Nevada, [32]
Certificate of Mailing Attached. [31]

[Endorsed]: Filed June 24, 1955.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED CHANGES IN
PRETRIAL ORDER FILED JUNE 16, 1955

Defendants refers to the Pretrial Order filed by the Court on June 16, 1955, and suggests the following as an appropriate change to conform to the Pretrial discussion:

At Page 5, Lines 19 to 21, under the heading, "Stipulations", the Order states, "It is conceded that defendant's defense of last clear chance against John A. Duff has no merit as against Jennie R. Duff and Elizabeth Bronson." A review of the law as applied to plaintiffs' contentions relating to the particular facts under which the collision of these two vehicles occurred is such that we do not consider that at this time defendant should make such a concession, and for that reason defendant objects to that language in the Pretrial Order.

It is stipulated with counsel for plaintiffs that on Page 5, Paragraph 1, Line 16, the word "Settle-meyer" should be substituted for the word "Spring-meyer", and also that on Page 2, [33] Line 28,

the word, "applied" should be substituted for "applies".

Dated: June 23, 1955.

PIKE & McLAUGHLIN,
Attorneys for Defendant.

/s/ By MILES N. PIKE,
For the Firm. [34]

[Endorsed]: Filed June 25, 1955.

[Title of District Court and Cause.]

NOTICE AND MOTION TO AMEND
PRE-TRIAL ORDER

To the Above-Named Defendant and His Attorneys,
Pike & McLaughlin, and to the Above-Entitled
Court:

You, and Each Of You, will please take notice that on November 7, 1955, at the hour of 10:00 o'clock A.M., the plaintiffs will move the above-entitled Court to amend the Pre-trial Order of the above-entitled Court, which is dated June 13, 1955, as herein set forth in the said Motion; said Motion will be made and based upon the ground of the inadvertence, mistake and excusable neglect of plaintiffs' counsel.

Motion

Comes Now the plaintiffs above-named and move the above-entitled Court to amend said PreTrial Order, dated June 13, 1955, on Page 2, line 10, as to the following words thereof: "All three plaintiffs were riding in the front seat."

That in place thereof, the plaintiffs hereby move the above-entitled Court to insert the following: "That the plaintiff, John A. Duff, was driving said 1955 DeSoto automobile, the [43] plaintiff, Elizabeth Bronson, was seated on the right front seat, and the plaintiff, Jennie R. Duff, was in the back seat."

Said Motion will be made and based upon the Affidavit attached hereto.

Dated: November 1, 1955.

HERMAN E. BEDKE,
GOLDWATER, TABER & HILL,
WRIGHT & EARDLEY,

/s/ By GEORGE F. WRIGHT,
Attorneys for Plaintiffs.

Acknowledgment of Receipt of Copy Attached. [44]

AFFIDAVIT IN SUPPORT OF MOTION TO
AMEND PRE-TRIAL ORDER

State of Nevada,
County of Elko—ss.

George F. Wright, being first duly sworn, deposes and says:

That he is, and at all times herein-mentioned was, a duly licensed and practicing attorney in all of the Courts in the State of Nevada and in the District Courts of the United States, in and for the State of Nevada; that he, at all times herein-men-

tioned, was, and still is, in active charge of the above action on behalf of plaintiffs;

That affiant received the original Pre-Trial Order and went over the same and made certain requests for changes. That in going over the same, affiant failed to notice that the Pre-Trial Order provided that all three plaintiffs were riding in the front seat.

That there has been testimony in the Justice of the Peace [45] Court at Wells, Nevada, in the District Court at Elko, Nevada, and the depositions taken of all three plaintiffs. The testimony of all witnesses has been consistent at all times that Mr. Duff was driving, Mrs. Bronson was in the front seat and Jennie R. Duff was in the back seat;

That the defendant was present at the taking of testimony in the Justice of the Peace Court and the District Court, and his attorneys have had copies of the testimony in the District Court at Elko, Nevada, for a considerable length of time, and the depositions of all three plaintiffs were taken on September 19, 1955, by the defendant's attorneys.

/s/ GEORGE F. WRIGHT

Subscribed and sworn to before me this 1st day of November, 1955.

[Seal] /s/ ROSS P. EARDLEY,
Notary Public.

[Endorsed]: Filed November 7, 1955.

[Title of District Court and Cause.]

COPY OF MINUTE ENTRY FOR NOV. 7, 1955

* * * It is ordered that the Motion to Amend Plaintiff's Complaint is granted. It is further ordered, on motion of defendant, that the pre-trial order is amended striking the language objectionable to defendant. It is further ordered that at lines 20 and 30, page 2, of the pre-trial order, same is amended by striking the word "slush" and inserting the word "ice" in lieu thereof. * * * [47]

[Title of District Court and Cause.]

CERTIFICATE OF PLAINTIFFS' REQUEST
OF QUESTIONS TO BE PROPOUNDED
TO JURORS ON VOIR DIRE

This Is To Certify that on November 9, 1955, the above matter duly came on for trial before the above Court, sitting with a Jury, the Honorable John R. Ross, Judge, presiding, at Carson City, Nevada.

That on said day and before the trial commenced, George F. Wright, one of the attorneys for the plaintiffs, handed to the said Judge, John R. Ross, a paper designated "Questions Requested by Plaintiffs of Jurors." That one of the questions was as follows: "Do you own any stocks or bonds in the American Casualty Co." The Judge indicated that he would not ask the question proposed.

That in the voir dire examination the Judge did

not ask said question of the prospective jurors, nor did counsel for plaintiffs during said voir dire examination, or at any time at all in the courtroom, suggest that such question be asked; the only reference ever made to such question being in chambers prior to trial as above mentioned.

Dated at Carson City, Nevada, this 23rd day of July, 1956.

/s/ JOHN R. ROSS,

United States District Judge

Attest: A True and Correct Copy.

[Seal] /s/ OLIVER F. PRATT,

Clerk

/s/ By BERNARD SUPEROF,

Deputy.

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

VERDICT

We, your Jury in the above entitled matter, find in favor of the defendant, H. L. Page, and against the plaintiff, Elizabeth Bronson.

Dated: November 15, 1955.

/s/ EDWARD S. PARSONS,

Foreman. [48]

[Endorsed]: Filed Nov. 15, 1955.

[Title of District Court and Cause.]

VERDICT

We, your Jury in the above entitled matter, find in favor of the defendant, H. L. Page, and against the plaintiff, Jennie R. Duff.

Dated: November 15, 1955.

/s/ EDWARD S. PARSONS,
Foreman. [49]

[Endorsed]: Filed Nov. 15, 1955.

[Title of District Court and Cause.]

VERDICT

We, your Jury in the above entitled matter, find in favor of the defendant, H. L. Page, and against the plaintiff, John A. Duff.

Dated: November 15, 1955.

/s/ EDWARD S. PARSONS,
Foreman. [50]

[Endorsed]: Filed Nov. 15, 1955.

[Title of District Court and Cause.]

VERDICT

We, your Jury in the above entitled matter, find in favor of the defendant and counterclaimant, H. L. Page, and against the plaintiff, John A. Duff, and fix defendant's and counterclaimant's damages

in the amount of \$6,816.58 against the plaintiff, John A. Duff.

Dated: November 15, 1955.

/s/ EDWARD S. PARSONS,

Foreman. [51]

[Endorsed]: Filed Nov. 15, 1955.

[Title of District Court and Cause.]

JUDGMENT ENTRIES MADE IN THE CIVIL DOCKET

November 16, 1955. Entg. Judgment, Judgment: Judgment is entered in favor of the Defendant H. L. Page and against the plaintiff, Elizabeth Bronson. Entg. Judgment, Judgment: Judgment is entered in favor of the Defendant H. L. Page and against the plaintiff, Jennie R. Duff. Entg. Judgment, Judgment: Judgment is entered in favor of the Defendant H. L. Page and against the plaintiff, John A. Duff. Entg. Judgment, Judgment: Judgment is entered in favor of Defendant and counter-claimant, H. L. Page and against plaintiff, John A. Duff in the amount of \$6,816.58.

Counsel notified of above entry of Judgment.

March 15, 1956. Entg. Judgment. Judgment: It is ordered that plaintiff's motion for judgment notwithstanding the verdict and judgment be, and the same hereby is denied.

Entg. Judgment. Judgment: It is ordered that the Motion of plaintiff and counter-defendant for a new trial be, and the same hereby is, denied.

Counsel notified of the above entries. [52]

In The United States District Court
For The District of Nevada

No. 1217

JOHN A. DUFF, JENNIE R. DUFF, his wife,
and ELIZABETH BRONSON, Plaintiffs,

vs.

H. L. PAGE,

Defendant.

NOTICE OF ENTRY OF JUDGMENT

To Plaintiffs, John A. Duff, Jennie R. Duff, his wife, and Elizabeth Bronson, and to George Wright, Esq., Herman Bedke, Esq., and Harold O. Taber, Esq., their attorneys:

Each of you will please take notice that on November 16, 1955, the following judgments were entered by the Clerk of the above-entitled Court in the above-entitled case:

Judgment entered in favor of the defendant, H. L. Page, and against the plaintiff, Elizabeth Bronson.

Judgment entered in favor of the defendant, H. L. Page, and against the plaintiff, Jennie R. Duff.

Judgment entered in favor of the defendant, H. L. Page, and against the plaintiff, John A. Duff.

Judgment entered in favor of the defendant, H. L. Page, and against plaintiff, John A. Duff, in the amount of \$6,816.58.

Dated this 18th day of November, 1955.

REX J. HANSON,

PIKE & McLAUGHLIN,

Attorneys for Defendant.

/s/ By MILES N. PIKE,

Of Counsel. [53]

Acknowledgment of Service Attached. [54]

[Endorsed]: Filed Nov. 19, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

To the above-entitled Court and to the Clerk thereof, and to the Defendant and Counterclaimant, H. L. Page, in the above-entitled action, and to Pike & McLaughlin and Rex Hansen, Attorneys for Defendant and Counter-claimant:

Comes Now The plaintiff and counter-defendant, John A. Duff, and the plaintiffs, Jennie R. Duff and Elizabeth Bronson, jointly and severally, and each for himself or herself, moves the above-entitled Court to vacate and set aside each and every of the verdicts of the jury entered on November 15, 1955, and each of the Judgments entered thereon on November 16, 1955, and to grant a new trial of said cause to each and every, all and singular, the said plaintiffs and said counter-defendant, upon the following grounds:

(1) Insufficiency of the evidence to justify any or all of the Verdicts;

(2) That said Verdicts, and each of them, are against law;

(3) Errors in law occurring at the trial and excepted to by each of the plaintiffs and by the counter-defendant;

(4) Irregularity in the proceedings of the defendant and counterclaimant, H. L. Page, by which the plaintiffs, [60] and each of them, and the counter-defendant were prevented from having a fair trial;

(5) Orders of the Court by which the plaintiffs, and each of them, and the counter-defendant, were prevented from having a fair trial;

(6) Accident or surprise which ordinary prudence could not have guarded against;

(7) Irregularity in the proceedings of the Jury by which the plaintiffs, and each of them, and the counter-defendant were prevented from having a fair trial;

(8) Misconduct of the Jury;

(9) Irregularities in the proceedings of the Court by which the plaintiffs, and each of them, and the counter-defendant were prevented from having a fair trial;

(10) Newly discovered evidence material to the plaintiffs, and each of them, and the counter-defendant, which could not, with reasonable diligence, have been discovered and produced at the trial;

(11) Manifest disregard by the Jury of the Instructions of the Court;

(12) Also, upon any other ground or reason for

which new trials have heretofore been granted in actions at law in the Courts of the United States.

Dated: November 18, 1955.

GOLDWATER, TABER & HILL,
HERMAN BEDKE,
WRIGHT & EARDLEY,

/s/ By GEORGE F. WRIGHT,
Attorneys for Plaintiffs and
Counter-Defendant.

Acknowledgment of Service Attached. [61]

[Endorsed]: Filed Nov. 22, 1955.

[Title of District Court and Cause.]

ORDER DENYING MOTION OF PLAINTIFF
AND COUNTER-DEFENDANT FOR NEW
TRIAL

The plaintiff and counter-defendant's motion for new trial came on this 28th day of December, 1955, for argument, George F. Wright appearing for the plaintiff and counter-defendant, and Miles N. Pike appearing for the defendant and counter-claimant, and the matter being fully argued, it was ordered that the matter be deemed submitted for ruling on the filing of briefs, and said briefs having been filed and considered; now, therefore, and good cause appearing, it is

Ordered, that the plaintiff's motion for new trial be, and the same hereby is, denied.

Dated at Carson City, Nevada, this 15th day of March, 1956.

/s/ JOHN R. ROSS,

United States District Judge. [98]

[Endorsed]: Filed March 15, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Jennie R. Duff and Elizabeth Bronson, two of the plaintiffs named above, hereby appeal, jointly and severally, to the United States Court of Appeals for the Ninth Circuit from those two certain final Judgments, and the whole thereof, entered in above action on November 16, 1955, which Judgments appealed from being more particularly set forth as follows:

Judgment entered in favor of the defendant, H. L. Page, and against plaintiff, Jennie R. Duff.

Judgment entered in favor of the Defendant, H. L. Page, and against plaintiff, Elizabeth Bronson.

Notice Is Further Given that said plaintiffs, Jennie R. Duff and Elizabeth Bronson, hereby appeal, jointly and severally, to the United States Court of Appeals for the Ninth Circuit from that certain Order Denying Motion for New Trial entered in the above action on March 15, 1956, insofar

as said Order pertains to plaintiffs, Jennie R. Duff and Elizabeth Bronson.

Dated: April 11, 1956.

HERMAN BEDKE and
WRIGHT & EARDLEY,

/s/ By ROSS P. EARDLEY,
Attorneys for plaintiffs, Jennie R. Duff and Elizabeth Bronson. [99]

[Endorsed]: Filed April 12, 1956.

[Title of District Court and Cause.]

CASH DEPOSIT IN LIEU OF BOND
FOR COSTS ON APPEAL

The plaintiffs, Jennie R. Duff and Elizabeth Bronson, herewith deposit with the Clerk of the above Court the sum of \$250.00 in cash as and for their Bond for costs on appeal.

The condition of this deposit or Bond is that whereas the said plaintiffs have appealed to the United States Court of Appeals for the Ninth Circuit by notice of appeal filed April 12, 1956, from the Judgment of this Court entered March 15, 1956, if the said plaintiffs shall pay all costs adjudged against them if the appeal is dismissed or the Judgment affirmed, or such costs as the appellate court may award if the Judgment is modified, then this Bond to be void and said cash so deposited be returned to said plaintiffs, but if said plaintiffs fail

to perform this condition, said cash so deposited shall be paid over to defendant forthwith.

Dated: April 13, 1956.

WRIGHT & EARDLEY,
/s/ By ROSS P. EARDLEY,
Attorneys for Plaintiffs Jennie R. Duff and Elizabeth Bronson.

The check received for cash bond on appeal in the sum of \$250.00 was written and signed by Messrs. Wright & Eardley, therefore, the receipt was issued to them.

J. P. FODRIN. [100]

[Endorsed]: Filed April 14, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On the Motion of plaintiffs, Jennie R. Duff and Elizabeth Bronson, and the Court being fully advised and good cause appearing;

It Is Hereby Ordered:

That the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by plaintiffs, Jennie R. Duff and Elizabeth Bronson, by Notice of Appeal filed April 12, 1956, is extended to and including July 2, 1956, pursuant

to Rule 73 (g) of the Federal Rules of Civil Procedure.

Dated: May 8th, 1956.

/s/ JOHN R. ROSS,
United States District Judge. [101]

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
AND DOCKETING RECORD ON APPEAL

On the motion of plaintiffs, Jennie R. Duff and Elizabeth Bronson, and the Court being fully advised and good cause appearing;

It Is Hereby Ordered:

That the time for filing and docketing the record on appeal of Jennie R. Duff and Elizabeth Bronson in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including July 11, 1956.

Dated July 2nd, 1956.

/s/ JOHN R. ROSS,
United States District Judge. [102]

[Endorsed]: Filed July 2, 1956.

United States Court of Appeals for the
Ninth Circuit

No. 1217

JENNIE R. DUFF and ELIZABETH BRON-
SON, Appellants,

vs.

H. L. PAGE, Respondent.

MOTION FOR EXTENSION OF TIME TO
FILE AND DOCKET RECORD ON APPEAL

Come now the appellants, Jennie R. Duff and Elizabeth Bronson, and respectfully move the above Court for an exparte order that the time for filing the record on appeal with the U. S. Court of Appeals for the Ninth Circuit and docketing therein the appeal taken by said appellants by Notice of Appeal to the U. S. District Court of the District of Nevada, on April 12, 1956, and the time for filing the transcript and appellants' statement of points upon which they intend to rely, be extended to and including August 2, 1956.

This Motion is made pursuant to Rule 73(g) of the Federal Rules of Civil Procedure and also Rule 37 of the Rules of the U. S. Court of Appeals for the Ninth Circuit, and is based upon the fact that the Court Reporter has had an eye operation and has not been able to prepare a transcript prior to this time and the ninety (90) [103] days beyond which the District Judge cannot extend the time ex-

pires July 11, 1956, all as more specifically set forth in the Affidavit of appellants' attorney and the Affidavit of Marie D. McIntyre, Court Reporter, filed herewith.

WRIGHT & EARDLEY,
By ROSS P. EARDLEY,
Attorneys for Appellants.

So ordered:

WILLIAM DENMAN,
Chief Judge, U. S. Court of Ap-
peals for the Ninth Circuit.

[Endorsed]: Filed July 3, 1956. Paul P. O'Brien,
Clerk. [104]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America, District of Nevada—ss.

I, Oliver F. Pratt, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents and exhibits, listed in the attached index, are the originals filed in this court or true and correct copies of orders entered on the minutes or dockets of this court.

I further certify that the Instructions given by the Court, Defendant's refused instructions and Plaintiff's refused instructions, have been omitted from the record on appeal, same now being a part

of the Reporter's Transcript, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 10th day of July, A.D., 1956.

[Seal] /s/ OLIVER F. PRATT,
Clerk. [125]

In the United States District Court for the
District of Nevada

No. 1217

JOHN A. DUFF and JENNIE R. DUFF, his
wife, and ELIZABETH BRONSON,
Plaintiffs,

vs.

H. L. PAGE, Defendant.

TRANSCRIPT OF TESTIMONY

Jury Trial

Carson City, Nevada.

November 7, 8, 9, 14 and 15, 1955.

Before: Hon. John R. Ross, Judge.

Be it remembered, that the above-entitled matter came on for trial before the Court, sitting with a jury, the Hon. John R. Ross, Judge, presiding, on Monday, November 9, 1955, at Carson City, Nevada.

Appearances: Wright & Eardley, by George L. Wright, Esq. and Goldwater, Taber & Hill, by Har-

old O. Taber, Esq. and Herman Bedke, Esq., Attorneys for Plaintiff.

Pike & McLaughlin, by Miles N. Pike, Esq. and Rex J. Hanson, Esq., Attorneys for Defendant.

The following proceedings were had: [1*]

H. L. PAGE

called as an adverse witness on the part of the plaintiff, being duly sworn, testified as follows:

Cross Examination

Q. (By Mr. Taber): Will you state your full name please? A. H. L. Page.

Q. Where do you live, Mr. Page?

A. Wells, Nevada.

Q. How long have you lived there?

A. About 23 years.

Q. What is your business or occupation?

A. Garage.

Q. How long have you been so engaged?

A. Since 1937.

Q. When you say garage, do you operate a repair service there in Wells? A. Yes, sir.

Q. Have you done so since 1937?

A. Yes, sir.

Q. Where do you live in Wells, Nevada?

A. One block behind the garage. The streets are not numbered or named.

Q. Married, are you? A. Yes, sir.

Q. What is your wife's name?

A. Dexie. [2]

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of H. L. Page.)

Q. In connection with your business, do you operate a tow car service? A. Yes, sir.

Q. How long have you operated the tow car service?

A. The present wrecker has been in operation since 1941. I operated a home-made one from '37 to '41.

Q. From '37 then until the end of 1954 you were engaged in the business of towing disabled cars, wrecked cars, in the vicinity of Wells, Nevada, is that true? A. Yes, sir.

Q. In general how much territory do you cover with your tow car in that type of business?

A. I usually went half way between Wells and Elko, half way between Wells and Ely, half way between Wells and Wendover, and to the Nevada State line north.

Q. That would be about to Contact?

A. Well, beyond Contact.

Q. On the road to Twin Falls, Idaho?

A. Yes, sir.

Q. You say you operated a home-made wrecker prior to the one that you have at the present time?

A. That is right.

Q. Is that true? A. Yes, sir.

Q. What type of vehicle was that? [3]

A. Ole '28 model Buick.

Q. And you acquired your present tow car truck in what year?

A. 1941. I bought it in December, 1940 and arrived at Wells with the car January 6, 1941.

(Testimony of H. L. Page.)

Q. What type of vehicle was that?

A. It was a Studebaker make truck.

Q. Was it equipped with a boom or towing equipment when you purchased it?

A. I had the wrecker part mounted on the chassis at Chattanooga, Tennessee, by the Holmes Wrecker people.

Q. What kind of towing equipment does the Studebaker have on it?

A. It is a Holmes, what is known as a Holmes Wrecker Manufacturing Company of Chattanooga, Tennessee.

Q. Just what kind of equipment is that?

A. I don't quite understand what you mean.

The Court: What does it consist of?

Q. Do you have a winch or boom?

A. Oh, yes.

Q. Would you describe it for the Court and jury please?

A. It has two booms. They are about twelve feet long. It is cable power operated. It has winding cables, power to operate it. Raising and lowering the boom is done by hand with a crack.

Q. Each of these booms, you say, are 12 feet long? A. Approximately.

Q. And you use them for different purposes?

A. Yes sir.

Q. Would you explain that to us, please?

A. Depending on the degree of the object you are pulling would control the position of the boom or booms, depending on what you are towing, the

(Testimony of H. L. Page.)

position of the object and what you are intending to do with it, whether you are going to roll it over, pull it up a steep embankment, or what you are going to do with it. It would vary. There are four winches. If you are going to bring a car that went off a sharp embankment, say 45 degree up the embankment, on to the highway, it would be necessary that you have your boom higher, raised higher, for that operation, due to the fact that it would, if you pulled the car up against the foot of the embankment, if you do not have your boom higher, you would be pulling against yourself on the front of the car you were pulling on the highway, up against the embankment, you would be pulling against yourself, rather than have a tendency to lift it up and start it up the embankment, if you were turning over. A heavy truck that has turned over and you are pulling it back on its wheels, you would lower the boom to where you would be pulling directly off the mast on the boom, but directly off of the mast, to keep from pulling the front of your wrecker, tipping it up, raising up the front wheel, gives you more power, then turn the truck over on its wheels. By that method, where you had the booms up where it would pull beyond the booms, it would have a tendency and would continue to be sufficient pull [5] and raise the front of the wrecker right off the ground.

Q. You operated these two booms manually, is that right? A. That's right, sir.

Q. You operated the three pits, so to speak, by

(Testimony of H. L. Page.)

a manual crank? A. That's right.

Q. Did you have a mechanical winch on the wrecker? A. Yes, sir, power operated.

Q. That is operated by the motor of the truck itself, is it not? A. Yes sir.

Q. And in order to engage that winch you would simply take the truck out of gear and put this winch in gear, isn't that true?

A. Well, you have your truck gear shift in neutral and put your power take-off gear to engage it with the transmission, which by a chain you drive the drum that contains the cable on the wrecker.

Q. And the cable extended over the boom?

A. That's right.

Q. You would attach that to the wreck or disabled vehicle, is that true?

A. That's right.

Q. And was that the condition of your wrecker on December 31, 1954? A. Yes sir. [6]

Q. How much did that wrecker weigh?

A. I would say it would weigh, with the tools and equipment in it, around six and a half to seven ton. That is an estimate. I never weighed it.

Q. Now do you recall the 31st of December, 1954? A. Yes sir.

Q. Did you receive a call to take a car out of the barrow pit on the highway between Wells and Elko, Nevada? A. Yes sir.

Q. About what time did you receive that call?

(Testimony of H. L. Page.)

A. Somewhere between 8:30 and 8:45, as best I recall, A.M.

Q. That was in the morning? A. Yes sir.

Q. How did you receive that call, Mr. Page?

A. Capt. Bartz of the Highway Patrol came over to the garage and said he had just received word by a trucker that there was a car and trailer off the road about 14 miles west, two men and a lady and little baby in the car and asked if we could go out and put it back on the road.

Q. That was about 8:30 in the morning?

A. Somewhere around 8:30 or 8:45.

Q. You knew that the car and trailer was off the highway at a point approximately 14 miles west of Wells at that time? A. Yes sir.

Q. And you answered that call? [7]

A. Yes sir.

Q. Did any one accompany you to the scene where this trailer and car were off the highway?

A. Yes sir.

Q. What are their names?

A. Clifford N. Elton, a mechanic, and my grandson, Leonard M. Jewell.

Q. How old is Leonard Jewell?

A. Fourteen.

Q. How old was he on December 31, 1954?

A. He was fourteen. He is just about fifteen now—well, he was fifteen in September.

Q. And he is your grandson?

A. Yes sir.

Q. The other man's name was Elton?

(Testimony of H. L. Page.)

A. Elton.

Q. He is still an employee of yours?

A. Yes sir.

Q. What were his duties in connection with your business? A. He was mechanic.

Q. Did he also assist you in the tow business?

A. He did on occasion.

Q. He accompanied you on this call also?

A. Yes, sir.

Q. And the three of you rode in the seat of the Studebaker [8] wrecker from Wells, Nevada, out to the scene where the car and the trailer were off the road, is that true? A. Yes sir.

Q. What time did you leave Wells?

A. It was only a few minutes after I received the call, around 8:45 to 8:50; maybe 8:45, I don't recall exactly.

Q. Do you recall what time you arrived at the scene where the U-Haul trailer and car were off the highway?

A. I would say it was around 9:30, maybe 9:40, as near as I recall.

Q. Now did you have chains on your wrecker?

A. No sir.

Q. No chains on the tires at all?

A. No, sir.

Q. What was the condition of the highway from Wells to the point 14 miles west of Wells, where the trailer and car were off the highway?

A. The first about 12 miles was spotty, spots of ice, varying anywhere from 25 feet to 200 or

(Testimony of H. L. Page.)

300 feet, where the road would have ice or hard packed snow on it, and then there would be open spots, dry spots, and for the next mile and a half hard packed snow, or up to within a couple of hundred feet of the point of the accident.

Q. So would you say from the point where the trailer and car were off the highway, for a distance of a mile and half east [9] on Highway 40, the highway was covered with hard packed snow?

A. Yes, with the exception of around 150, maybe 200, feet immediately east of the point of the collision.

Q. And what was the condition of the highway for that distance?

A. Snow had melted and it was just slushy. The water was running down the highway.

Q. And you didn't put the chains on your wrecker?

A. No sir.

Q. You didn't consider it necessary?

A. No sir.

Q. About what speed did you drive out there do you estimate?

A. About 40 or 45.

Q. You are well acquainted with the highway between Wells and Elko, are you not?

A. Yes sir.

Q. Been over it many times?

A. Many times.

Q. Been over this section of the highway between Wells and the point where the car and trailer were off the road too, have you not?

A. Yes sir.

(Testimony of H. L. Page.)

Q. Been over that many many times?

A. Yes sir.

Q. Approximately how many times?

A. I wouldn't attempt to estimate it. I have no idea. [10]

Q. Have you been over it many times in winter, that particular stretch of highway between Wells and the point where the U-Haul trailer and car were off the highway?

Q. I have been over it—it varies how many wrecker calls I might have. I might be over it three or four times in one week and might not be over it again for two or three weeks.

Q. But you have been over it many times during the winter weather, have you not?

A. Yes.

Q. You are acquainted then with the various grades and hills and curves on that highway between Wells and the point where the U-Haul trailer and car were off the highway?

A. Yes sir.

Q. Would you say that you are well acquainted with the road? A. Yes, sir.

Q. Now that highway is known as U. S. 40, is it not? A. Yes sir.

Q. That is one of the main transcontinental highways across the State of Nevada, isn't that true? A. Yes.

Q. It is also true, is it not, Mr. Page, that that highway is heavily travelled? A. Yes sir.

Q. And the traffic on that highway is heavy, not

(Testimony of H. L. Page.)

only in the summer time, but also in the winter time, isn't that true? [11]

A. That would depend on what you would term heavy.

Q. Well, you drove it on this particular day, did you not, December 31st? A. Yes sir.

Q. What was the traffic condition at that time?

A. It was heavier at that particular time than it was ten days later, due to the time of the year it was and people returning home, had spent Christmas at various points and there were quite a few more cars on the road at that time than would have been a week or so later, after everybody got home.

Q. I realize this is a difficult question—approximately how many cars did you see on the highway between Wells and the point where the U-Haul trailer and car were off the highway, when you went there that morning?

A. It would be purely a guess. I had no occasion for counting them.

Q. Did you see one car?

A. Oh, I seen more than that. I would estimate I saw at least 25 or 30 vehicles, maybe more, I don't know.

Q. Did you see any trucks on the highway?

A. Yes sir.

Q. Now when you arrived at the scene where the trailer and car were off the highway, what did you observe?

A. The car and trailer off the road, down an embankment.

(Testimony of H. L. Page.)

Q. On what side of the road? [12]

A. On the north side.

Q. The road at that point lies in a general easterly and westerly direction, does it not?

A. Yes.

Q. This car and U-Haul trailer were off on the north side, off on an embankment, is that true?

A. Yes sir.

Q. How many feet off the road were they? Let us take the car first.

A. The car—well, I don't know how far, I imagine around 16 feet off, the car was, and the trailer tongue was probably three feet long and the trailer was about seven feet long; the back end of the trailer was just about two feet from the edge of the highway.

Q. From the edge of highway, referring to the north shoulder? A. North shoulder.

Q. In general what position was the car and the U-Haul trailer when you first observed it?

A. About a 20 degree angle off the road, facing in a northwest direction, the car was.

Q. The car then was facing in a generally northwest direction, is that true? A. That is true.

Q. Are you oriented to the directions in the courtroom? A. No, I am not. [13]

Q. This is north, south, west, east—so that you say the car was facing in a general northwest direction?

A. That's right. Take the courtroom running

(Testimony of H. L. Page.)

this way, east and west, this would be north and that would be south and then I won't get confused.

Q. That would not be true, though. Your back, as you are seated in the witness chair, Mr. Page, is to the south—this is north, this is to your right, is east, to your left is west. Now are you oriented?

A. This is east, west, south and north.

Q. If I understand you correctly, the car and the trailer were still connected? A. Yes sir.

Q. And there is a tongue on that trailer, is there not? A. Yes sir.

Q. And that fits over a ball, a steel ball, on the bumper of the car, isn't that the way it is connected? A. Yes sir.

Q. Then if the car was pointed in a northwest direction, in which way was the trailer situated from the car?

A. Directly behind it, pointing the same direction, other than it was turned over on its right side.

Q. Now when you mention the right side, you are talking about the side of the trailer as it would proceed in a forward direction, isn't that true? [14]

A. Yes sir.

Q. So that the trailer was on its right side?

A. Right.

Q. And was the car on its wheels?

A. Yes sir.

Q. So that the trailer, being on its right side and the car on its wheels, it had twisted this connecting tongue, isn't that true? A. Yes.

(Testimony of H. L. Page.)

Q. The trailer, you say, was about six feet off the north shoulder of the road?

A. You mean the back end of the trailer?

Q. Yes.

A. No, I said about two feet approximately.

Q. The front of the car was how far off the north shoulder of the road?

A. It was the length of the Ford automobile, plus three feet of trailer tongue, seven feet of the trailer bed and two feet. That's it as near as I can estimate.

Q. I don't think you answered my question. From the north shoulder of the highway 40, in a northerly direction, how far was it to the radiator or front of this Ford automobile?

A. I don't understand the question.

Mr. Pike: The other question, he did explain that.

Q. (Illustrates on the blackboard): Now, Mr. Page, I have marked the direction of it here. The top of this blackboard is north, [15] bottom south, this is east and this is west. Suppose this is Highway 40. Now are you oriented to that?

A. Yes sir.

Q. When you arrived on the scene, you found an U-Haul trailer, is that true? A. Yes sir.

Q. And a Ford sedan automobile off on the north side of the road, is that true?

A. Yes sir.

Q. You said that the car was facing in a north-

(Testimony of H. L. Page.)

west direction, is that true? A. Right.

Q. Now have I placed this car in the correct position when you first saw it? A. Yes sir.

Q. Now it was connected with a tongue approximately how long?

A. Approximately three feet.

Q. And behind the car was an U-Haul trailer?

A. Yes sir.

Q. Now have I faced the U-Haul trailer in approximately the right position?

A. Yes sir, except it was turned over.

Q. Now, this being the trailer, it was lying on its right-hand side? A. Yes sir. [16]

Q. The car was on its wheel, is that true?

A. Yes sir.

Q. Headed in a general northwest direction?

A. Yes sir.

Q. The rear then would be headed in a general southeast direction, is that true? A. Yes sir.

Q. Now you said that this U-Haul trailer was about two feet off the north shoulder of the highway? A. That corner of it was.

Q. Now my question is, how off the north shoulder of the highway was the front of the Ford automobile, if you remember?

A. I haven't any way of even estimating the distance. It was from about a 20 degree angle.

Q. When you say 20 degree angle, you are referring to this imaginary 20 degree angle, are you?

A. North.

(Testimony of H. L. Page.)

Q. Do you mean that this would be a 20 degree angle off the north shoulder of the highway 40, is that right? A. Yes.

Q. When you arrived there, Mr. Page, were you able to determine how that car and trailer got in the position in which you found it?

A. No, I didn't pay any attention how it got there.

Q. Did you inquire? [17]

A. No, not that I remember.

Q. You didn't ask any questions? A. No.

Q. Do you know which direction that Ford and U-Haul trailer was travelling before it went off the highway?

A. Not at the time I arrived there, I didn't know.

Q. Did you determine that later?

A. After the accident I found out they were going east.

Q. After the accident that the Ford and the trailer were involved in?

A. No, after the accident with the wrecker.

Q. In which you were involved?

A. Yes sir.

Q. For approximately a mile and a half east on Highway 40, you say the highway was covered with hard packed snow, is that true?

A. With the exception of a couple of hundred feet probably immediately east of the wreck.

Q. And for that 200 feet immediately east of

(Testimony of H. L. Page.)

where you found the U-Trailer you say it was spotty?

A. No, I say it was slushy. The snow had melted and it was just slush.

Q. When you arrived there, did you observe the condition of the highway west of where you found the U-Haul trailer and the Ford? A. Yes.

Q. What was the condition of the highway to the west?

A. It was practically clear; no snow or ice for quite a distance beyond, for so far as I could see.

Q. Approximately how far was that?

A. A mile and a half.

Q. You could see, then the mecadamized portion of this road to the west, is that true?

A. Yes, a little rise and then the highway dropped down and went up another little rise.

Q. And you didn't see any snow to the west of the point on Highway 40 where the car and the trailer were off the road? A. No sir.

Q. What is the first thing you did when you arrived on the scene?

A. Turned my blinker light on just before I arrived at the point of the accident.

Q. Where is that situated on your wrecker truck? A. On top of the cab.

Q. What kind of a light is that?

A. It is a red light; switched on and off, on and off, on and off and you can see it for 360 degrees.

(Testimony of H. L. Page.)

Q. You turned that on before you arrived at the scene where this car and trailer were off the road? A. Yes.

Q. There is a switch then I take it, inside the cab, is that [19] true? A. Yes sir.

Q. Where is that switch located?

A. On the dash.

Q. On the dash board? A. Yes sir.

Q. Did you check the red light to see if it was on after you brought your car to a stop?

A. I have a switch light in the switch itself and you turn it. If the light doesn't turn on top, the light doesn't turn on at the time and no flash. However, I checked it.

Q. It is similar then, to the light treatment on current automobiles, there is a little red light on the dash that indicates when your lights are on from the board and when they are off, from the board, is that true? A. Similar, this is correct.

Q. You did, you say, check your red light that is situated on the top of the cab to see if it was working?

A. I did when I got out of the truck.

Q. Was it working? A. Yes sir.

Q. Then what did you do?

A. Looked over the situation and the car and trailer that was off the road, determined the condition, whether there was a rock underneath the car, for instance, that would hinder [20] it coming back on slip it over on the trailer.

(Testimony of H. L. Page.)

Q. For what purpose.

A. For the purpose I just came here to see what the condition was. I afterward determined the location of the car and the trailer as to what was going to be necessary to put them back on the road without damage to the car or trailer, whatever it might be.

Q. When you first pulled up to the scene where this car and trailed were off the road, did you stop on the highway or on the shoulder?

A. I pulled over as far as I could get to the right-hand side of the highway.

Q. And was your wrecker headed in a westerly direction?

A. Yes sir, would be the north side of the highway.

Q. Then you pulled off, then, on to the shoulder, north shoulder of the Highway 40, isn't that true?

A. That's right.

Q. Did you observe how wide that shoulder was at that time?

A. I don't know whether you would call it a shoulder or not. It was black-top, to the edge of the embankment, with the exception a ridge of black-top material which the highway department put up there to keep the water from coming up and washing down the bank. It was black-top clear over.

Q. You could observe, could you not, Mr. Page, a white center line on the highway? [21]

A. Could I see it?

(Testimony of H. L. Page.)

Q. Yes. A. Yes, I was watching it.

Q. That being true, then, how far was it from the center line where you stopped to the hard shoulder of the road?

A. I was on the north side of the road, as far over as I could get, when I stopped.

Q. I will repeat the question. When you stopped—if this is the car and U-Haul trailer—how far was it at that point between the white center line and the north shoulder of the road? What is the distance between those two?

A. I don't know exactly.

Q. Approximately what was the distance?

A. About 20 feet, maybe 22, I don't know. It may be twenty.

Q. Did you discuss getting the car and U-Haul trailer back on to the highway with the people who were there?

A. I don't understand that question.

(Question read.)

A. No, I had no discussion with them. All they wanted to do was to get it back on the road.

Q. You didn't discuss it with them?

A. You mean the procedure, or how I was going to do it?

Q. Yes. A. No, I had no occasion.

Q., Who made the decision as to the method that you finally used to get the car and U-Haul trailer back on the highway? [22]

A. I did.

(Testimony of H. L. Page.)

Q. And you drove the car from Wells out to this point 14 miles west of Wells, is that true?

A. No.

Q. Who did? A. Mr. Elton.

Q. Who placed the car then in position to get the car and U-Haul trailer back on to the highway?

A. I did.

Q. That is, Mr. Elton drove out there and after you arrived, you drove the car and placed it in position on the highway, is that true?

A. That's right.

Q. Now what position did you place it in?

A. About 20 degree angle in the opposite direction from the way the car and trailer was off the highway.

Q. In other words, you placed your wrecker in that position, is that right. (Illustrating)

A. No. It was approximately behind the trailer.

Q. Yes. Is the angle right? A. About.

Q. Directly behind, would be directly south?

A. In the same alignment with the car and trailer.

Q. Extended here? A. That's right. [23]

Q. Would that be the position that you placed your wrecker? A. Directly behind it.

Q. Now, Mr. Page, how far was the left rear of your wrecker from the north shoulder at the time you placed it in that position A. Right on it.

Q. And how far was the front of your car from the white center line? A. About three feet.

(Testimony of H. L. Page.)

Q. That is the distance between the front of your car and the center line would be three feet, is that true? A. Approximately that.

Q. What is the overall length of your wrecker?

A. Eighteen feet.

Q. And that is from the tail-gate in the back, or bumper to bumper?

A. From the extreme back end of the wrecker, the tail-gate as you call it, to the front of the front bumper.

Q. Eighteen feet, is that right, overall length?

A. Yes sir.

Q. Now just after you placed your wrecker in that position, what did you do?

A. Took the left-hand cable and a chain, fastened the chain on the bottom side of the trailer, bottom side of it, around the wheel, the wheel that was on the ground, and hooked the cable [24] onto the chain, to set the trailer back up on its wheels, which I did, but the embankment was so steep, it wouldn't stay there by itself, unless a little weight was put on it, so Mr. Shaw, the man who owned the Ford, put a little pressure on it to hold the trailer up right while I in the meantime—there was a car coming from the east and a truck coming from the west— and I left the rear end of the wrecker, where the controls are that controls the winches, I left back there and went to the front of the wrecker on the road, and I saw the car and truck coming and I estimated it was going to be too close for a

(Testimony of H. L. Page.)

car to go by before the truck did, and the truck was coming up the hill and it tied up his momentum, a heavy truck, it was much easier for the car coming west, which was a passenger car, to stop and let the truck go by first, so I signalled the car to stop and he did stop and the truck went by and I motioned him to go on up in front.

Q. In other words, this truck was proceeding in an easterly direction towards Wells?

A. That is right.

Q. What kind of a truck was it?

A. Semi-trailer transport.

Q. And the car you just mentioned was proceeding in a westerly direction towards Elko, is that right?

A. Yes sir.

Q. And then the man that was with Mr. Shaw held it so it [25] wouldn't tip over?

A. Mr. Shaw held it himself.

Q. And while he was holding the U-Haul trailer, you saw this situation of a truck going one way and a car the other and you went out to direct traffic, isn't that true?

A. That's right.

Q. Now did you have fuses or flares? Did you carry those with your wrecker?

A. Yes sir.

Q. Did you have them in your wrecker on the morning of December 31, 1954?

A. Yes sir.

Q. Where were they?

A. In the tool compartment.

Q. That is in the bed of the wrecker?

(Testimony of H. L. Page.)

A. No, it is a tool compartment built for that purpose and immediately behind the truck cab.

Q. How many flares did you have?

A. You mean the kind you light?

Q. Yes? A. I had both kinds.

Q. What kind did you have?

A. I had six of the kind that you light that burn with a flare and I had four of the reflector type.

Q. You had six flares that you could light.? [26]

A. They burn kerosene, pot flare.

Q. Are those similar to the smudge pots the construction companies use? A. That's right.

Q. And you had six of that type?

A. Yes sir.

Q. And you had some reflector type also?

A. Yes sir.

Q. How many reflector type flares?

A. Four.

Q. So you had four flares of the reflector type, you had six that burned kerosene and they were situated in the tool compartment immediately behind the cab, is that true? A. Yes sir.

Q. Did you have these with you on the morning of December 31, 1954? A. Yes sir.

Q. Did you put them out on the highway?

A. No sir.

Q. Did you have a flashlight or red light that could be used, other than the one mentioned? Was your truck equipped with that? A. Yes.

(Testimony of H. L. Page.)

Q. And what kind of equipment was that? Can you describe it for us? [27]

A. It is a flashlight with a red part that long.

Q. A red tube or light?

A. Red tube I guess you would call it.

Q. You are indicating about 8 to 10 inches long?

A. Yes, about.

Q. How does that function?

A. Just like a flashlight.

Q. You can turn it on and it will show a red light, is that true? A. That is right.

Q. For what purpose did you carry that in your wrecker? A. To use in case it was needed.

Q. Did you have it with you that morning?

A. Yes sir.

Q. Was it functioning?

A. As far as I know. I had no occasion to use it.

Q. Did you have any other equipment to warn the travelling public of the presence of your wrecker on the road?

A. I had two board signs I carry.

Q. Did you have those with you on the morning of December 31, 1954? A. Yes sir.

Q. What kind of signs are those?

A. It is "Danger," "Look Ahead."

Q. Approximately how large are they? [28]

A. About 18 inches by two and one-half feet, maybe 20 inches wide, 30 inches.

Q. They are rectangular in shape?

(Testimony of H. L. Page.)

A. Something like this here, about 20 inches this way and about 30 inches this way.

Q. And are they rectangular in shape?

A. No.

Q. They are 20 by 30?

A. Yes, approximately.

Q. Is that the shape of the sign? A. Yes.

Q. And it would be 20 inches high, 30 inches in length? A. Something like that.

Q. Are those signs identical? A. Yes sir.

Q. And it had "Danger," "Look Ahead," is that right? A. Yes.

Q. What color were the signs?

A. White background and red letters.

Q. Red and white. The word "Danger, with the word "Look Ahead" side by side underneath?

A. "Danger" on top and "Look Ahead" is underneath.

A. "Look" and "Ahead" is all on one line.

Q. White background with red letters? [29]

A. Yes sir.

Q. What is the size of the letters?

A. I couldn't tell you.

Q. Approximately?

A. Probably four inches. That is purely a guess.

Q. There is a ruler right here—would that be the approximate height?

A. Would be a little higher.

Q. More like this? Then you are not guessing when you say five inches?

(Testimony of H. L. Page.)

A. Yes, I imagine—it is only a guess.

Q. Would you say the height of the lettering you have just given us would be approximately correct? A. As near as I can estimate, yes.

Q. Mr. Page, did you put those signs out after you arrived at the scene of this collision?

A. No sir.

Q. Did you have any other equipment on your truck to warn the travelling public of the presence of your wrecker on the highway? A. No.

Q. So your truck was equipped with six flares of the ignition type that you light, that burn kerosene, is that right? A. Yes.

Q. And it is equipped with four flares of the reflector type. [30] Now can you describe those for us?

A. Just have some stuff on them. You flash a light like you have on trailers, has mercury behind the glass. When the light hits, it shows red or blue or green, whatever it happens to be.

Q. You can put those reflectors out on the highway? A. That's right.

Q. Similar to the flares?

A. Yes. It doesn't show them unless you have a light hit them because they are just their natural color.

Q. If the lights of a car struck these reflectors, the operator of the car would be able to see those reflectors, is that true? A. Yes.

(Testimony of H. L. Page.)

Q. Likewise, if the sun shone on any of those reflectors, it would reflect light, wouldn't it?

A. I imagine that would depend on the condition of the sun. I don't know whether it would or not. It may or may not.

Q. You didn't put these six flares out?

A. No.

Q. You didn't put the four reflectors out?

A. No.

Q. You didn't use your flash equipped with a long red light, you didn't use that?

A. No sir.

Q. Nor did you put the work signs out, is that true? A. No. [31]

Q. And you say you did put the red light on, situated on the top of the cab of the wrecker?

A. Yes sir.

Q. And you knew it was on because the mechanic went inside the cab and told you so, is that right?

A. He did and I also looked.

Q. You looked after you alighted from the wrecker truck, isn't that true? A. Yes sir.

Q. Why did you put this red light on, Mr. Page?

A. It is an emergency vehicle.

Mr. Taber: I move the answer be stricken as conclusion of the witness.

The Court: It may stand.

Q. You put the red light on, did you not, to warn the travelling public of the presence of the wrecker, isn't that true? A. Yes sir.

(Testimony of H. L. Page.)

Q. And you knew that for a distance of approximately a mile and a half to the east of where this Ford and U-Haul trailer were off the road that the highway coated with packed snow, with the exception of the one or two hundred feet you mentioned, is that true? A. Yes sir.

Q. You knew then, when you placed your wrecker in that position on the highway, that it was in a position of danger, did you not, [32] Mr. Page?

A. You are always in danger when you stop a vehicle on the highway. There is a certain amount of danger, yes.

Q. The answer is yes? A. Yes sir.

Q. And you knew that your wrecker was in a position of danger, isn't that true?

A. Yes sir.

Q. And you knew that any one in the immediate vicinity of the wrecker would also be in a position of danger, did you not?

A. That would depend.

Q. Well, let's—did you have any one in the cab operating the mechanical booms and the winch?

A. No.

Q. You didn't have any one in there?

A. No sir, not operating anything.

Q. No one was in the cab?

A. Not operating anything.

Q. Was any one seated in the cab?

A. Yes.

Q. During the time that you righted the trailer?

(Testimony of H. L. Page.)

A. Yes.

Q. Who was that?

A. Mrs. Shaw and her two or three months' old baby.

Q. Where was Mr. Elton? [33]

A. He was uncoupling the safety chains from the trailer hook-up to the car.

Q. And your grandson?

A. I don't know where he was.

Q. You knew then, did you not, Mr. Page, that any one standing, we will say, on this side, or the hight-hand side of your wrecker, was in a position of danger, did you not, from the travelling public, when you parked it there?

A. That would depend again.

Q. Well, you say your wrecker was in a position of danger, is that true?

A. It was on the highway, that is true.

Q. And it was in a dangerous position?

A. If any one was walking toward the highway.

Q. Was it possible, Mr. Page, for west-bound cars to go by your wrecker without going over into the east-bound lane of traffic? A. No.

Q. It wasn't possible? A. No sir.

Q. Now you have told us how you saw a truck proceeding in an easterly direction and a car in a westerly direction.

The Court: I think this is a good time to take our mid-afternoon recess.

Jury admonished and recess taken at 3:00 o'clock. [34]

3:15 P.M.

Presence of the jury stipulated.

MR. PAGE

resumes the witness stand on further examination by Mr. Taber.

(Last question read.)

Mr. Taber: I will withdraw that.

Q. If I understood you correctly, Mr. Page, when you saw this truck going in an easterly direction and the car in a westerly direction, you went out and personally directed traffic, is that true? A. Yes sir.

Q. And did you use your flashlight with the red light? A. No sir.

Q. How did you direct traffic?

A. With my hand.

Q. Tell us what you did.

A. I gave them a stop sign; the car that was coming down the hill going west, I gave them a stop sign.

Q. As you are now indicating with your arms?

A. I gave it a stop sign with both hands and he kept on coming down hill and I saw he was under control, stopping, and then I motioned the truck to keep coming.

Q. Where were you on the highway when you were signaling the car and the truck?

A. At the right front corner of my wrecker—the left front corner [35] of my wrecker.

(Testimony of H. L. Page.)

Q. That would be right there?

A. Right there.

Q. That would be in a position by the left front fender indicated by the "x" with the circle around it that I put there, is that true? A. Yes sir.

Q. And from that position you were able to signal the oncoming truck, coming from the east, is that true?

A. I was standing in front of the wrecker, in front of the front bumper of the wrecker, on the left side of the front bumper.

Q. And was there anything between you and the visibility of the driver of the truck?

A. Nothing.

Q. You say the truck slowed down?

A. Not that I could tell it didn't, because I gave him the on signal.

Q. You gave him the come-on signal?

A. Yes sir.

Q. And you gave the oncoming car going west the stop signal, is that right? A. Yes.

Q. What directed your attention to the truck proceeding in the easterly direction and the car in a westerly direction? [36]

A. I was watching.

Q. What time did you say you arrived out here at the scene where this Ford car and U-Haul trailer were in the barrow pit?

A. Around 9:30 I think.

Q. You left Wells at approximately what time?

A. Around 8:45, 50.

(Testimony of H. L. Page.)

Q. So it took you 45 minutes to go the 14 miles, is that true? A. Approximately.

Q. How long had you been at the scene before the U-Haul trailer was righted? By that, I mean placed back upon its wheels.

A. Oh, probably 20 minutes.

Q. That would be about 10 minutes to 10, approximately? A. As near as I recall.

Q. Now after the car and the truck went by the scene, the car in a westerly direction and the truck in an easterly direction, what then happened?

A. I walked from that position indicated by "x" around in front of the wrecker. I looked east and I looked west. There was nothing in sight either direction, except the big truck that was going east, was almost to the top of the hill. There was no other car coming east or west. I walked from that direction indicated by "x" around in front of the tool compartment just behind the cab, stepped up on the running board of the wrecker, raised the compartment door and looked in to see if I had a coat. I left the door down and stepped down off the wrecker—and boom. [37]

Q. By "boom," you mean something happened?

A. Yes.

Q. And what was that, if you know?

A. That was the car that collided with the wrecker.

Q. A car collided with the wrecker?

A. Yes.

Q. How long did it take you, Mr. Page, to walk

(Testimony of H. L. Page.)

from the position you indicated by the "x" with the circle around it, to the right-hand side of the tool compartment, open the lid of the tool compartment and look for your coat?

A. It couldn't have possibly been over eight or ten seconds.

Q. And you then looked to the east to see if there were any cars coming?

A. Immediately when I started around the truck, I looked both ways and then came around the truck.

Q. As you were walking from the left front of your truck around to the tool compartment, you looked in both directions?

A. I looked before I started.

Q. And when you arrived, you opened the lid of the tool compartment to get a coat, is that true?

A. Yes sir.

Q. When you looked to the east, you saw that the truck was almost to the top of the hill to the east, is that true? A. Yes sir.

Q. How far from the top of the hill was the truck? [38]

A. Oh, I would say about six or seven hundred feet, maybe not that far.

Q. And there were no cars coming in a westerly direction in that time? A. Or easterly.

Q. No cars going east? A. No sir.

Q. As you reached the tool compartment to get a coat, then this collision occurred, is that true?

(Testimony of H. L. Page.)

A. No, there was no coat in it. I just looked to see if there was.

Q. And as you looked, the collision occurred?

A. No, I had looked and closed the lid of the wrecker tool compartment and had stepped down on the pavement.

Q. And then you stepped down on the right-hand side of the wrecker? A. Yes.

Q. And how long did that take?

A. It couldn't have taken over eight or ten seconds from the time I left the front until I had walked around and raised the tool compartment lid and closed it and stepped down on the ground and the accident happened.

Q. So from the time you left the left front of your wrecker until the time this collision occurred, it was eight or ten seconds?

A. Not any more. [39]

Q. You didn't see a car coming?

A. No sir.

Q. What is the next thing you remember?

A. Lying there on my back.

Q. Where?

A. On the highway, on the south shoulder.

Q. In the vicinity of where your wrecker was?

A. Quite a ways down the highway from where the wrecker was standing.

Q. Approximately how far?

A. About twenty feet.

Q. To the south?

(Testimony of H. L. Page.)

A. It would be diagonal from the way the wrecker is going.

Q. Southwest?

A. Well, it would be this way—yes, southwest.

Q. This is south, and you were on the south shoulder, lying on your back? A. Yes sir.

Q. That is the next thing you remember?

A. Yes sir.

Q. Were you knocked unconscious?

A. No.

Q. What did you do then? A. I got up.

Q. And then what? [40]

A. I walked back around on the north side of the wrecker. I walked back toward the trailer and the pick-up and the DeSoto car.

Q. Yes, and then what?

A. I met Mr. Duff walking toward me.

Q. At the time this collision occurred, you say Mrs. Shaw and the baby were seated in the cab of the wrecker? A. Yes sir.

Q. Was any one else seated in the cab?

A. No sir.

Q. Are you sure of that? A. Yes sir.

Q. Referring to page 39 of the transcript of the Elko trial, the testimony of Mr. Page, commencing at line 12. Do you remember testifying, Mr. Page, at a trial held in Elko, Nevada, during April of this year? At that time, Mr. Page, I will ask you if it isn't a fact that the following questions were asked you and you gave the following answers:

(Testimony of H. L. Page.)

“Q. Who was in the cab of the truck while the trailer was being righted? Was there anybody?

A. Mrs. Shaw. Q. And anybody else? A.

My grandson going out there. Q. What was his name? A. Leonard Jewell.” Did you not so testify?

A. I did, but I also said that going out there to the point of the accident that my grandson was in the cab, to the point of the accident, not at the time after I arrived at the accident. It [41] so states here.

Q. The question was, who was in the cab of the truck while the trailer was being righted, was there anybody? “A. Mrs. Shaw. Q. And anybody else? A. My grandson going out there.”

A. That was going out there.

Q. You so testified?

A. Yes, sir. He was in the cab going out there. I didn’t intend to testify he was in the cab with Mrs. Shaw.

Q. Now, Mr. Page, when you walked around, after signaling the truck to come on and the car to stop, just prior to the time of this collision, where was Mr. Elton?

A. He was engaged in removing the safety chains on the right side of the trailer hitch from the car.

Q. From here, is that right? A. Yes.

Q. Where was your grandson?

A. The last time I saw him, when I walked out to take care of the traffic, the truck and car,

(Testimony of H. L. Page.)

I saw coming, he was standing by the side of the back end of the car, talking to Mr. Elton.

Q. He was standing about where?

A. About right there.

Q. Mrs. Shaw was seated in the cab of the car then as you walked around the front of your wrecker? A. Yes sir.

Q. Did you ask Mrs. Shaw to look out for traffic while you [42] were looking for your coat?

A. No sir.

Q. You didn't? A. No sir.

Q. Now as a result of this collision, Mr. Page, you were injured, were you not? A. Yes sir.

Q. Tell us how you were injured?

A. I was struck in the groin, was knocked off the highway. Injured in that region and I have conditions now that I never had before.

Q. And what is that condition?

A. My sex life is nil.

Q. You are unable to have marital relations with your wife? A. Yes sir.

Q. And has that continued since December 31, 1954? A. Yes sir.

Q. To the present time? A. Yes sir.

Q. Prior to the collision, I assume that you and Mrs. Page maintained a normal marital relation?

A. Yes.

Q. And how many times a week did you and she have marital relations prior to December 31, 1954?

Mr. Pike: Your Honor, I do not think that is

(Testimony of H. L. Page.)

a proper [43] question to ask any witness, for that matter. It is not a pleasant subject for Mr. Page. I think we have the facts of it and the extent of his injuries, but to go into a matter of that sort seems highly improper. I can't imagine circumstances where the number of times of relationship would have any bearing upon any such situation.

Mr. Taber: Your Honor, I admit it is a rather delicate subject, but this man is asking for twenty thousand dollars damages from Mr. Duff and the basis is the injury which he received which prevents him from having marital relations with his wife, and I am certainly entitled to go into this.

The Court: Is that the residual effect of it? There is no other remaining damage?

Mr. Taber: The only one he is claiming I know of.

Mr. Pike: So far, because he hasn't finished his testimony in that regard.

The Court: Gentlemen, inasmuch as this witness's complaint for damages is based upon his loss of sexual power, I do not see any reason why he can't testify to it. You may answer the question. Objection overruled.

Q. Do you want the question again?

A. If you please.

(Question read.)

A. Twice or three times. [44]

Q. Since the accident, you are unable to have marital relations with your wife?

A. Yes.

(Testimony of H. L. Page.)

Q. How old are you, Mr. Page?

A. Fifty-six.

Q. On December 31, 1954, you were 56?

A. No, 55.

Mr. Taber: That's all.

The Court: Do you desire to question the witness at this time, Mr. Pike?

Mr. Pike: Yes, I would like to.

Examination

Q. (By Mr. Pike): Mr. Page, on the morning of December 31, 1954, what were the conditions of the atmospheric visibility in the area where the Shaw car was off the highway?

A. Unlimited.

Q. And but for having your view obstructed by the surrounding hilly area there, advise what was the terrain? Were you able to have an unobstructed view?

A. Yes sir.

Q. Now will you describe the general area in which the Shaw car was off the right, or north, shoulder of the road? Generally what sort of an area was it? Describe the highway on each side of it.

A. It was going down a slight grade. [45]

Q. Coming from which direction?

A. Coming from the east to the west, it would be going down a slight grade, and the car and the trailer was off the highway immediately to the east end of a cut and the beginning of a fill and

(Testimony of H. L. Page.)

down an embankment of about eight feet or so, at about a 45 degree angle.

Q. Then just immediately east of where the Shaw car was by a cut, you mean that the highway had been altered and the earth had been removed by a cut? A. Yes sir.

Q. And then by fill you mean the earth had been filled in, a depression there and a fill, is that right? A. Yes sir.

Q. All right. Now going west from where the Shaw car was, could you describe the general land?

A. It was upgrade going east for a distance of probably twenty-one to twenty-two hundred feet, leveled off.

Mr. Wright: That is going east you are talking about?

Q. Now I ask you about going west from where the Shaw car was. What you just answered, that was going east from there? A. Yes sir.

Q. Now tell us about going west from where the Shaw car was.

A. The road was perfectly straight, slight grade going down for just probably 400 or 500 feet, and then it leveled off.

Q. And then where did it go from there? [46]

A. For a distance of probably three-quarters of a mile it was level and just a slight rise in the ground and it started down a very slight grade.

Q. Now from where you were, where you stopped your wrecker, can you approximate, in

(Testimony of H. L. Page.)

terms of fractions of miles or yards or feet, or any way you want to do it, the distance that you could see back toward the direction from which you had come; that is, toward the east; and likewise the distance on toward the west, toward Elko, that you could see at that time.

A. To the east, where the trailer and car was off the road, to the east I could see about 2100 or 2200 feet.

Q. That is, you could see the highway?

A. Yes, sir, I could see the highway.

Q. And why couldn't you see it a further distance than that? A. It drove over the hill.

Q. Going on east? A. On east.

Q. How about going on west, so far as ability to see the highway was concerned?

A. You could see for approximately two miles, a mile and a half to two miles west from the point where the car was off the road.

Q. Then standing here at the front of the wrecker, you were in a position to view these distances of highway and you say you looked to the west and looked to the *west* as to any traffic coming from either direction, is that correct? [47]

A. Yes sir.

Q. Now you have testified to certain flares and flashlights, signs, that you had in the tow car on that day, and will you give your reason for not using any of that equipment?

Mr. Taber: I submit that calls for conclusion of the witness. After all, the standard of care that

(Testimony of H. L. Page.)

is required out there is ordinary care, and I think it is up to the members of the jury to ultimately decide that question.

The Court: This witness has testified what he, as an ordinary person, thought was necessary under the circumstances. Objection overruled.

(Question read.)

A. I didn't feel that it was necessary, due to the fact that you could see any one approaching from the west, could see the wrecker for approximately a half mile, and that is as far as I would have had a flare out had the condition existed that obstructed the view closer to the wrecker, and it could be seen for a mile and a half or two miles coming from the opposite direction, and I didn't consider it was necessary to put out flares or signs of any kind. It was bright daylight, the sun was shining and it was clear. There were a few clouds in the sky.

Q. And in that connection, you testified to a passenger car coming from the east, headed toward the west, and a truck coming from the west, headed toward the east, and you having signaled [48] the passenger car to stop and having signaled the truck to proceed on to the east. Now could you at this time recall approximately how far a distance the passenger car was from you when you undertook to signal it to stop?

A. Oh, I would estimate it perhaps a thousand feet.

(Testimony of H. L. Page.)

Q. And based upon your observation—was your signal to stop *headed at* the driver of that car?

A. Yes sir.

Q. From any observation that you made, was any difficulty experienced by that car in stopping?

A. No sir.

Q. Now with reference to the truck, if you can, state at this time the approximate distance that he was from you when you motioned to him to come on?

A. He was about a thousand feet west of the wrecker.

Q. And after you signalled to the truck, did the truck continue to come ahead and thereafter proceed on *west*? A. Yes.

Q. Now during the time that you were there, prior to the accident, do you recall whether or not any other vehicles, either east-bound or west-bound, passed the scene where your wrecker was placed?

A. Yes sir.

Q. And will you state the facts in that regard, as you recall?

A. Some 15 or 20 cars and trucks that had passed by that point [49] from the time I arrived and the accident occurred, going in both directions.

Q. And will you state whether you observed any of those cars having any difficulty in passing your wrecker? A. No sir.

Q. Had there been any delay or required stopping on the part of any such vehicles, either west-bound or east-bound, during the time your wrecker

(Testimony of H. L. Page.)

was stopped there, by the traffic you have just referred to was going by in both directions?

A. It wasn't necessary for me to stop any other car. They were so coming a car coming east would have had plenty of time to go by before the car coming east from the west would reach the point, so they just went by.

Q. Now will you state whether or not these reflector type flares were customarily used at night?

A. Yes sir.

Q. And under what general conditions are other flares placed?

A. When it is snowing heavy or when it is foggy or bearing on a curve or immediately around a curve, then I used the procedure I put signs back a half mile in both directions, with the kerosene type flare setting in front of each one of them.

Q. Were there any conditions existing at that time that, in your best judgment, required the use of flares or flashlight or any of the other kinds?

A. No sir. [50]

Q. After your wrecker had been placed in position to bring the trailer and the Ford owned by Mr. Shaw back on to the highway and in the general direction of the line made by the Ford and trailer, will you state the condition of the south traffic line south of the center line on the highway, so far as having any obstructions of any nature in it was concerned, in the vicinity of the wreck?

A. It had none; it was open.

Q. And referring to this diagram, showing the

(Testimony of H. L. Page.)

Ford, trailer and the wrecker, can you state approximately the distance between the rear end of the tow car and the rear end of the trailer?

A. About two feet.

Q. Then if this diagram were considered to be drawn approximately to scale, the distance presently existing shown on the diagram between those two points would be exaggerated, wouldn't it?

A. Yes sir.

Q. I believe you testified that the U-Haul trailer was approximately seven feet long, as you recall?

A. Yes sir.

Q. And that the tongue, or portion of the trailer used to hitch the trailer to the Ford car, was approximately three feet long?

A. Yes.

Q. And on the diagram, if that would make a distance of ten feet, would the distance between the rear end of the trailer and the [51] rear end of the *trucker* appear substantially the same distance, or about ten feet, if those were considered to be the scale?

A. Yes sir.

Q. So it is not the scale?

A. No sir.

Q. In other words, the rear end of the wrecker and the rear end of the trailer would necessarily be much closer together if they were to be placed relatively, according to the length of the trailer and car to the two feet between the trailer and the wrecker, is that correct?

A. Yes sir.

Q. Now I believe you testified that your front end of the wrecker or tow car was not as far south on the highway as the center line, and will you

(Testimony of H. L. Page.)

please state, from your recollection, how far the southernmost part of the tow car was north of the east and west center line of the highway?

A. About three feet from the southernmost part of the wrecker to the center line.

Q. Now will you describe the color of the trailer?

A. It was an orange color, I thought.

Q. And do you know whether or not it had any lettering on it?

A. Yes, it had lettering on it.

Q. And if you know, will you tell the color of that?

A. Black.

Q. What was the general name applied to this trailer? [52]

A. U-Haul.

Q. Is that the same type U-Haul trailer that is seen on many occasions on our highways now?

A. Yes.

Q. For approximately how long had the trailer been placed back on its wheels prior to the time of the accident?

A. Just probably a couple of minutes.

Q. And then referring to the color of this U-Haul trailer, as it was on its wheels and its right side, that is, facing when the trailer was toward the east, what was the color on the side of the trailer toward the east?

A. Orange.

Q. Now if you know, will you state the color of the Ford car?

A. It was a green car.

Q. And will you state the color of your tow car or wrecker?

(Testimony of H. L. Page.)

A. The body of the wrecker is dark blue, the top of the cab is a light blue.

Q. Is there any particular reason for having two colors on the wrecker, what we call a two-tone, rather than one solid color, in your opinion?

A. Yes sir. The engineers from the wrecker people who built the wrecker and painted it, suggested the two-tone color and the color I had it painted by them at the time was a dark blue and light blue and they stated, the safety people, the dark blue on a light terrain would show up and the light blue above it against [53] the dark background, it showed up more than a solid color of any kind.

Q. Coming to this light on top of the cab that you refer to as a blinker light, I believe, when did you turn that light on with reference to the time that the tow car was in the vicinity of the Shaw car off the highway?

A. I turned it myself when we first came over the crest of the hill and saw the car and trailer off to the side of the road, I turned it on then.

Q. And following the accident, in which the De Soto car and the tow car were involved, do you know whether or not the blinker light was continuing to burn on top of the cab of the tow car?

A. Yes sir, I do.

Q. Was it burning or was it not burning?

A. It was burning.

Q. And thereafter did any person turn the blinker light off?

A. Not until some time after the wrecker was

(Testimony of H. L. Page.)

being driven back to Wells, about five miles an hour, I turned it off when I met the ambulance coming from Wells out to the scene of the accident, I turned it off at that point. I looked at my indicator and saw my red light was still on and I turned it off. That was about six miles east of the point of the accident.

Q. Now going from your garage at Wells to the scene of the Shaw car, what persons were riding in the tow car with you?

A. Mr. Elton, my grandson, Leonard Jewell.

A. And what persons were in the cab of the tow car at the time of the collision with the De Soto car?

A. Mrs. Shaw and her young baby.

Q. Now with reference to the time that you arrived at the Shaw car with your tow car, when did Mrs. Shaw and her baby get in the cab of the tow car?

A. Immediately after I arrived.

Q. And generally what was the temperature or weather condition at that time?

A. It was, I imagine, around 50 degree temperature and 20 or 25 mile an hour wind blowing. She was cold, her and the baby. I had the heater on in the wrecker and she asked me if she could get in with the baby out of the cold.

Q. After you had arrived at the trailer, you testified that you were looking for a coat?

A. Yes.

Q. Did you have any coat on before that?

A. I had a light one on and my jacket.

Q. Now after the collision of the De Soto and

(Testimony of H. L. Page.)

the tow car, what was the condition of the windshield in the tow car? A. It was broken.

Q. Was it in place? A. Yes sir.

Q. And what was the general condition of the tow car itself, as to the points of damage on it?

A. Very badly damaged on the left side on the center of the left front fender clear to the rear end of it. The rear wheels were setting at about 10 to 15 degree angle across west of the wrecker, instead of setting under it. The frame was badly damaged. The running board knocked completely off. The rear fender was just barely hanging. The door of the wrecker, the sill underneath the door, was badly caved in and the door itself open. The booms were broken apart. The wrecker is fastened together with cast iron and they were broken.

Q. Thereafter were you able to move the tow car under its own power back to your garage at Wells? A. Yes sir.

Q. Did you do that? A. Yes sir.

Q. At about approximately what speed?

A. About five miles an hour.

Q. Thereafter you had repairs made to the tow car, did you not? A. Yes sir.

Q. About how long was it before you had the use of the tow car after that?

A. I didn't get the tow car back from Salt Lake City until February 25th or 26th, 1955.

Q. And you have handed your attorneys the repair bill for repairing that car, have you not?

A. Yes sir. [56]

(Testimony of H. L. Page.)

Q. Coming now to the time after the De Soto had collided with the tow car and you got up and walked back toward the wrecker and saw Mr. Duff, would that mean John Duff, who is in the court room today? A. Yes sir.

Q. Let me inquire first, when you got up, was the wrecker in the same place that it had been on the highway prior to such collision?

A. No sir.

Q. Where was it after the collision, with reference to where it had been before the collision?

A. It would be about the point of the arrow across the white line.

Q. You are referring now to this diagram on the blackboard and the arrow is at the edge of it?

A. The center of the highway.

Q. It would be the southernmost point on that arrow that designates generally the width of the highway, from the center line to the north shoulder, is that correct?

A. Yes, I estimate about 60 feet it was north.

Q. When you had placed your wrecker in position, prior to righting the trailer on its wheels, what, if anything, had you done with reference to the brakes in the trailer?

A. I had shut the brakes and the braking system on the wrecker with the lever that you can block all four wheels and will hold [57] them on until you turn the lever to release the pressure; 3200 pounds pressure on all four wheels.

(Testimony of H. L. Page.)

Q. What is the general character of the brakes you have on this wrecker?

A. They were in good condition. They were hydraulically operated and this mechanism was one of the standard mechanisms they use on all power brakes to hold them on a hill. You can go off and leave them for 24 hours and still have the wheels locked on the vehicle. You push down on the brake pedal and take this lever and pull it down and as you pull it down, you force the brake fluid through the line against the brake solution on the wheels and it stays there and doesn't release.

Q. Had you so set the brakes on the tow car prior to the time it was struck by the De Soto car?

A. Yes sir.

Q. Now had you taken any other steps with reference to the holding of the wheels of the tow car in place during the operation of bringing the trailer and Ford car back on to the highway?

A. Yes sir.

Q. What had you done?

A. Got some blocks. Put some cross ties to the two dual tire wheels, about six inches longer than the width of the dual tires and by about 8 by 10, and I put them behind each dual rear wheels.

Q. Those were blocks that you had with you in the tow car?

A. Yes sir. [58]

Q. And if you recall, which way was the tow car facing on the highway after being struck by the De Soto?

A. It was almost east.

Q. Facing toward the east?

A. Yes sir.

(Testimony of H. L. Page.)

Q. And you stated you walked from where you were on the highway. Now according to your best recollection, where were you when you got yourself up and started walking again after the collision?

A. I was just opposite the rear wheels of the wrecker on the shoulder of the highway to the south.

Q. That is the wrecker as it was in its new position? A. That's right.

Q. Were you south of its rear wheels, of the tow car? A. Yes sir.

Q. And would that place you in the north lane or south lane of the highway?

A. South side of the highway.

Q. And from there you walked back to what point before you met Mr. Duff?

A. Just about the front end of the wrecker on the north side of the wrecker.

Q. Had you observed at that time where Mr. Duff's car was, or the position of these other vehicles, the Ford and the trailer?

A. It was off about two-thirds way off the highway, down the embankment. [59]

Q. Where was it with reference to the Ford and the trailer?

A. It was to the right of it. It would be north.

Q. That is to your right?

A. Yes, I believe to the right of the U-Haul trailer.

Q. Off the road? A. Yes sir.

Q. Where was Mr. Duff when you first saw him?

(Testimony of H. L. Page.)

A. He was walking back toward me from his car.

Q. Was he on the highway at that time?

A. Yes sir.

Q. Were there any other persons present in that immediate vicinity at that time?

A. Yes, Mr. Shaw and his brother-in-law and Mrs. Shaw and Mr. Elton. I don't know whether the grandson had come back out of the field or not.

Q. Those were the people who were generally at the scene of the accident? A. Yes.

Q. And of course Mr. Duff and the other occupants of his car were there? A. Yes.

Q. Besides the Shaws and the people who accompanied you out there. And did you have any conversation with Mr. Duff at that time?

A. Yes sir. [60]

Q. And will you state what that conversation was?

A. I asked him why he hit the wrecker, and he said, "I didn't see it." And I pointed to the red light still blinking on the cab. I said, "How could you keep from seeing it, as big as it is and the red light blinking on top?" and he said, "I don't know." I said, "How fast were you going?" He said, "About 70 or 80 miles an hour."

Q. Did you have any further conversation with him? A. No sir.

Q. Did you observe the position of the Ford and the trailer following the collision? A. After?

Q. Yes, after the collision, as to where they

(Testimony of H. L. Page.)

were; if their positions were changed in any way?

A. They were knocked still further away from the highway in the direction they were prior to the accident.

Q. Did you notice any apparent damage to either of those two vehicles, resulting from the collision?

A. Yes sir, the trailer and the car both were damaged.

Q. What portions of the trailer were damaged?

A. The back end of it and also the tongue to hitch on to the car.

Q. And what about the Ford car, was there any apparent damage to that?

A. Yes sir, it was damaged. Damaged the back end of the car.

Q. And thereafter was the Ford car and also the trailer removed [61] to some garage?

A. Yes sir.

Q. Where were they taken to?

A. They were brought into my garage.

Q. After that you had further opportunity to examine the damage that had been sustained, is that correct? A. Yes.

Q. Mr. Page, I believe you testified you have lived in Elko County for many years?

A. Yes sir.

Q. How much of that time were you there at Wells? A. About twenty-three years.

Q. And generally in the operation of your tow car service, what help do you have in carrying on

(Testimony of H. L. Page.)

the business of getting vehicles back on the road, tow car service?

A. Ordinarily I didn't take any one. I did it alone.

Q. Was that true as a year-around business, both good weather and bad? A. Yes sir.

Q. And generally what would be the various types of vehicles that you would handle with this wrecker, from the time you got it in 1941 until the time of the collision?

A. All kinds of vehicles—trailers, two wheels, four wheels, passenger cars of all makes and trucks, PIE, Garrett moving equipment. [62]

Q. Your equipment was such that you were in a position to take care of these larger vehicles as well as smaller ones?

A. It was a six-ton truck.

Q. And when you receive a call requiring services of your tow car generally, who accompanied you when you responded to render tow car assistance?

A. Most of the time I did it myself.

Q. And will you state whether or not your physical ability and health was such as to enable you to do that without any undue stress?

A. Yes sir, it was.

Q. At that time, Mr. Page, about how tall were you, how much did you weigh?

A. Prior to the accident?

Q. Yes.

A. Weighed 145 pounds, 150.

(Testimony of H. L. Page.)

Q. And your height is what?

A. Five 11½.

Q. Generally you had good health all during that period of time? A. Yes.

Q. And you and Mrs. Page have how many children?

A. Three; two by a former wife who died. Five children altogether.

Q. How long have you and your present wife been married?

A. Twenty-eight years. [63]

Q. When you got up off the highway, how did you feel? A. Terrible.

Q. Where did you hurt?

A. In my head and in my groin. I couldn't straighten up.

Q. And thereafter did you go to see a doctor at Elko? A. Yes, sir.

Q. Is that Dr. Hood? A. Yes sir.

Q. And Dr. Hood told you your physical condition as he viewed it? A. Yes sir.

Q. And more recently, about the 15th of October, 1955, did you go to see Dr. Hood again?

A. Yes sir.

Q. And in connection with that, did he tell you his views with reference to the injuries you had sustained and the probability of your recovery from them? Don't tell what he told you, but say whether or not he has advised you in that regard?

A. Yes sir.

(Testimony of H. L. Page.)

Q. Since the accident have you had physical pain? A. Yes sir.

Q. And generally in what portions of the body have you had that pain? A. In my groin.

Q. Has that been just a pain that is occasional, or how would you characterize it? [64]

A. At times it is quite painful, lets up and don't have it any more for two or three or four days or a week, then it comes again.

Q. Has there been any apparent progress towards your being able to resume a normal sex life? A. No sir.

Q. Has your condition continued in that regard the same as it was following the accident?

A. Yes sir.

Mr. Pike: I think that is all for the present, your Honor.

Recross Examination

Q. (By Mr. Taber): Mr. Page, when you went to Dr. Hood, he practices in Elko, does he not?

A. Yes sir.

Q. When you went to Dr. Hood, following this accident in the early part of January, and again in May of this year—you recall, do you not, going to see Dr. Hood? A. Yes.

Q. He took a history; that is, he asked you a lot of questions, did he not, about how you felt?

A. Yes.

Q. What your complaints were, isn't that true?

A. Yes.

(Testimony of H. L. Page.)

Q. Just like Mr. Pike, he asked you where you hurt, isn't that right? [65] A. Yes.

Q. And he also asked you questions concerning your marital relations with your wife, isn't that true? A. Yes.

Mr. Taber: That's all.

Jury admonished and recess taken at 4:30 p.m.

Tuesday, November 8, 1955, 10:00 a.m.

Presence of the jury stipulated.

The Court: Mr. Clerk, I hand you a series of photographs with tabs on, showing plaintiff's and defendant's. If you will please mark these in evidence, subject to a statement as to stipulations concerning them. Do you want to stipulate the map?

Mr. Wright: So stipulate.

Mr. Pike: That is agreeable.

The Court: The map will be marked as plaintiff's Exhibit 13.

Clerk: Photographs, plaintiff's Exhibits 1 to 12 inclusive; defendant's photographs, Exhibits A to C inclusive.

The Court: The exhibits marked represent, first, the De Soto automobile plaintiff was driving. Now I am making this comment, so you can identify them. These three pictures of the [66] automobile were evidently taken inside the garage and are numbered Plaintiffs' 1, 2, and 3. Gentlemen, I think there is a stipulation as to this particular group, if you wish to state that.

Mr. Hanson: If your Honor please, the defendants stipulate that Exhibits 1, 2, and 3 are photographs of the plaintiff Duff's automobile, taken after the accident, and that they were taken inside the garage with a flash operated camera. The defendant does not stipulate that the color of the car or its appearance is correctly shown by the photographs. However, they are pictures of the car after the accident and do show the condition.

Mr. Wright: We accept the stipulation, if the Court please; that is correct.

The Court: That takes care of the Exhibits 1, 2, and 3. Exhibits 4, 5, 6, and 7 apparently represent the wrecker inside of the garage, where the pictures were taken.

Mr. Hanson: May it please your Honor, the defendant also stipulates, with respect to Exhibits 4, 5, 6, and 7, that they are photographs of the wrecker, taken in the garage, with a flash operated camera after the accident happened. However, the defendant does dispute that the photographs correctly show the color of the wrecker or its appearance, so far as the color is concerned. We do not stipulate to that. Then, if your Honor [67] please, defendant also does not stipulate that the photograph shows the full extent of the damage to the wrecker.

Mr. Wright: If the Court please, the plaintiffs accept that stipulation, and could we have it further stipulated those pictures were taken on or about January 4th of 1955.

Mr. Hanson: It may be so stipulated.

Mr. Wright: In other words, the question of the color is a question for proof and you are not stipulating that that was the color, that is a question of proof. The extent of damage would be the same thing.

Mr. Hanson: To make it clear, the defendant does not stipulate that those pictures do correctly show the color or appearance of the wrecker, so far as color was concerned; also defendant does not stipulate that those pictures show the full extent of the damage.

Mr. Wright: We accept that.

The Court: Exhibit A apparently represents the U-Haul trailer and this picture was taken outside.

Mr. Hanson: Your Honor, the substance of the same stipulation on Exhibit A of the U-Haul trailer. It is a photograph of that trailer after the accident, and we dispute that it shows the color of the trailer as it was, or that it shows the appearance of the trailer, so far as color is concerned. Also I think the photograph is merely a photograph of one side of the trailer and may not show the extent of the damage, but [68] we do agree it shows the damage so far as it shows in that picture.

Mr. Wright: We accept the stipulation.

The Court: Exhibits 9, 10, 11, and 12 represent a picture of what I assume to be Highway 40. What is your stipulation?

Mr. Hanson: May it please your Honor, the defendant is willing to stipulate, with respect to these latter exhibits, 9, 10, 11, and 12, they are photographs of the Highway 40, taken east of the

place where the accident happened; that these photographs may be introduced in evidence for illustrative purposes, to show the physical characteristics of the highway, that is, the surface, with the general view as you come over the hill immediately east of where the accident happened, going west, but, of course, the defendant does not agree, and the plaintiffs do not contend, that those photographs show conditions as they were at the time the accident happened. The defendant also refuses to stipulate, or does not stipulate, that any automobile shown on the photographs has any significance whatsoever, because the photographs were taken a long time after the accident occurred, and so far as the defense is concerned, will be introduced only for illustrative purposes.

Mr. Wright: If the Court please, we accept that stipulation. I might say the pictures were taken on March 31, 1955, and it is stipulated that there has been no change in the [69] construction of the highway from the time of the accident up to the time the pictures were taken. As to what might or might not have covered the road or what the weather was, things like that, is a question of proof. They are for illustrative purposes.

The Court: That leaves for the plaintiff a map. Is there any stipulation?

Mr. Wright: If the Court please, before we come up to the map, I wonder for reference to those pictures, we have the deposition of Mr. Fox.

Mr. Hanson: If you will check with the deposition and indicate the position where the camera was

held, the distance from the approximate center, we will accept that and you won't have to read the deposition.

Mr. Wright: It is in the deposition.

Mr. Hanson: I think we should have this qualification—if he were called, he would so testify.

Mr. Pike: Of course, it is recognized Mr. Fox's testimony with reference to any vehicles appearing in the photographs is objectionable.

The Court: We all understand the pictures were taken at a time after the accident, that any type of vehicle naturally does not fit the time and place. Very well—how about the map, Exhibit 13?

Mr. Pike: With reference to this map, your Honor, this, [70] of course, is not a map prepared by Mr. Settlemyer, the surveyor. It is prepared by an engineer of Reno, Nevada, and it is stipulated that this correctly depicts the plane view of U. S. Highway 40 and the general vicinity in which the accident occurred, showing the stations; that is, the designation given for the particular points on that highway in terms of numbers, and that plane view is drawn to a scale of one inch on the map representing 100 feet on the ground, so that the distance can be computed by counting the one inch distances on the plane view of the highway as you look at it from the top. Likewise drawn to that same scale there is a profile view, showing the figures 3.34 percent, as being the grade existing in that area, and likewise there is a profile view; that is, you look at the highway from its side, place on this graph paper, with the same scale as appears in the plane

view; that is, one inch on the map representing 100 feet on the ground, and that the grade is 3.34 percent means that there would be a vertical rise in the surface of the highway for every 100 feet traveled in the lateral distance. If you traveled 100 feet along the highway, the highway would rise 3 and one-third feet high. We will stipulate the map being admitted in evidence with that understanding and recognition of its characteristics. I might say, too, that the map has certain salient features indicated on the plane view of the map, projected on to the profile of the map. For example, the color, a certain cut, the guide post and one indication [71] that it may be necessary to refer to Mr. Settlement-meyer's deposition on it, as indicating the possible point of impact, for the reason that a piece of chrome metal was found at this particular point on the highway. Other than that, we accept it as correctly depicting the highway and the essentials just referred to.

Mr. Wright: May it please the Court, we accept that stipulation and we might call attention that there is one profile which is drawn to the scale of one inch equals 10 feet and the other that one inch equals ten feet, and the other that one inch equals 100 feet and that with reference to what the proper practice is in drawing it, etc., I do not know whether that is necessary to put that in at all.

The Court: Now on behalf of the defendant, we have three photos, representing the wrecker and tow car, taken outside and in the daylight apparently,

A, B, and C. Is there any stipulation in connection with those?

Mr. Wright: Those exhibits, defendant's A, B, and C, it is stipulated that those three pictures may go into evidence, as showing the defendant's wrecker, and it is the same wrecker as was involved in the accident, showing the condition after it was repaired and repainted. We do not stipulate that the color of the vehicle, after it was repainted, was the same as it was before the accident. The overall general appearance; in other words, the size and width and all that, has not been altered, [72] the heighth of the cab, and all that, I think is the same. The general appearance of the wrecker is the same in those pictures as it was before the accident. With reference to the question of color, that is a question of proof. We do not stipulate that shows the correct color before the accident. That is a question of proof.

Mr. Hanson: I understand it will be necessary for us to put on proof to show that the color in those photographs, A, B, and C, was the same as before the accident.

Mr. Wright: If that is your contention, it will be necessary to put on proof.

The Court: Gentlemen, I clip these exhibits together in relation to the various groups. We will handle them that way and keep them together and save some time. Now will you gentlemen stipulate that during all the discussion the jury has been present in the jury box?

Mr. Wright: So stipulated.

The Court: The record will show all of counsel also present. Gentlemen, you may proceed.

MRS. JENNIE DUFF

being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wright): What is your name, please? A. Jennie Duff. [73]

Q. Are you the wife of Mr. John A. Duff, who is in the court? A. Yes.

Q. Where do you live, Mrs. Duff?

A. Burley, Idaho.

Q. And what is your age? A. Sixty-one.

Q. At the time of the accident, how old were you? A. Sixty.

Q. You and Mr. Duff have been married how long?

A. Between 20 and 21 years. I do not remember the exact date.

Q. Do you have any children? A. One.

Q. How long have you lived in Burley, Idaho?

A. In Burley we have only lived about three years.

Q. Now calling your attention to December 31 of 1954, did you and your husband start on a trip?

A. May I make a correction on that date? We lived in Burley three years, but we lived five miles from Burley longer than that; in that vicinity.

Q. On December 31, 1954, did you start on a trip? A. Yes sir.

Q. About what time was it that you started?

(Testimony of Mrs. Jennie Duff.)

A. About six, somewhere around six in the morning.

Q. Would that be Pacific time or Mountain time? A. Mountain time. [74]

Q. So that would be one hour faster than Elko time or Pacific time. Now who started with you?

A. My husband and my sister.

Q. And your sister's name?

A. Elizabeth Bronson.

Q. Is that the Elizabeth Bronson who is in court here? A. Yes.

Q. In whose automobile?

A. My husband's.

Q. Was that a 1955 DeSoto sedan automobile?

A. Yes.

Q. Four door? A. Yes.

Q. And you started from Burley, Idaho?

A. Yes.

Q. Just briefly tell us generally your destination.

A. We were going to my sister's home at Vallejo and her son's home at Santa Rosa for a vacation, and also my brother and sister-in-law at Santa Rosa.

Q. You and your husband were going on a vacation trip? A. Yes sir.

Q. And your sister was riding with you?

A. That's right; she was going to her home.

Q. And your plans, you were going to go from Burley through what main towns?

(Testimony of Mrs. Jennie Duff.)

A. Well, Twin Falls and Wells and Elko. Shall I name all the [75] towns?

Q. Then on West. When you started out, how were you seated?

A. The three of us in the front. I was sitting in the middle.

Q. And I take it Mr. Duff was driving?

A. Yes.

Q. And Elizabeth Bronson on your right, all in the front seat? A. Yes.

Q. Now did you stay that way all the way up to the time the accident occurred, or was there a change? A. No.

Q. Where was the change, about?

A. Near the Idaho-Nevada line, close to the Nevada line.

Q. Somewhere near what they call Contact or Rox, some place like that? A. Yes.

Q. What change was made there?

A. Well, I felt sleepy so I just went over the seat, the back seat, took a pillow and covered myself up.

Q. When you started out, was the highway full of snow, when you left Burley?

A. It was raining in Burley that night. As I remember, before I got over, there was snow along the side of the road.

Q. Before you got into the back seat?

A. Yes sir.

Q. Up to the time that you got in the back seat,

(Testimony of Mrs. Jennie Duff.)

will you tell [76] us about your husband's driving, please?

A. Well, I consider my husband a good driver. He didn't drive very fast and kept on his own side of the road.

Q. Did he get off the road at all up to the time you got——

Mr. Pike: Objected to as too remote.

The Court: It may stand.

Q. You got in the back seat to go to sleep, you say? A. Yes.

Q. Then I take it you laid down? A. Yes.

Q. Did you go to sleep? A. Yes sir.

Q. You say you had a couple of blankets?

A. Yes sir.

Q. Were they over you? A. Yes sir.

Q. How far did you remain lying down, or do you remember when you woke up where you were? In other words, tell us where you were when you started to wake up, if you did, or what the situation was.

A. Well, it seems like I began to wake up a little — I sensed there was something wrong — it seemed not exactly wrong, but I heard my sister say, "It looks like something in the barrow pit". I did hear that. I had awakened enough, but I thought, "Oh, well, probably not anything", and I just went to sleep again. [77]

Q. Were you still lying down?

A. Yes sir.

(Testimony of Mrs. Jennie Duff.)

Q. And you didn't get up and sit up then?

A. No sir.

Q. Then what next did you know? What happened, do you know, from your own observation, or where did you come to, or what place?

A. Well, the next I knew I was lying on the bottom of the car; that is, my head and shoulders were on top and the rest of my body was in the body of the car.

Q. When you were lying down, was your head toward the driver's side or towards the other side?

The Court: Mrs. Duff, would you like to have a few moments before you continue your testimony?

A. I'll try.

Mr. Wright: Do you mind if I ask some leading questions?

Mr. Pike: Go ahead.

Q. Well, briefly, Mrs. Duff, I take it you found out there had been an accident in the car?

A. Yes.

Q. And you were taken by ambulance to the Elko County General Hospital? A. Yes.

Q. And then you stayed in the Elko County General Hospital about [78] how long?

A. Three weeks.

Q. And then you went by air ambulance to your home, did you not? A. Yes.

Q. Then when you came to in the car, you found yourself with your head toward the door on the driver's side? A. Yes sir.

(Testimony of Mrs. Jennie Duff.)

Q. And you were down into the bottom part of the rear seat? A. Yes.

Q. And then were you moved from your car into another car before the ambulance came?

A. Well, I tried to get up. I couldn't and the door seemed to fly open and I fell out backwards and some one caught me as I fell and I heard a man's voice and then there was more than one—I couldn't see because my head was cut so bad, bleeding, and then they packed me and put me in another car and then I was unconscious again.

Q. I want to try to shorten it and not go into too much detail. Did you have periods where you came to and then you blacked out?

A. Yes sir.

Q. Then do you remember going to the hospital in the ambulance? A. No sir.

Q. Do you remember when you came to, were you in the hospital in bed?

A. I came to—I can remember when they were sewing my head.

Q. That was the next thing? [79]

A. Yes.

Q. That would be the doctors were sewing your head. Then did you have periods where you lapsed and came back for some time? A. Yes.

Q. Do you have any idea yourself how long that period of lapsing and coming to lasted, over how many days?

(Testimony of Mrs. Jennie Duff.)

A. Oh, several days. I don't remember, but it was several days.

Q. Then I suppose—let's go up to see when you came to fairly good, so that you had pretty good periods of knowing where you were—what did you notice about those?

A. Well, they had me on a bed that went up with my head down and feet down from my hips was down and my head was down and it was up in the middle, and then they had a traction up over me in my chest, going up and over, with the weight on to hold my chest up.

Q. You found out that your chest had been fractured? A. Had been crushed.

Q. And they were pulling your chest upward with the weights? A. Yes sir.

Q. Did you have any difficulty with breathing when you saw that condition?

A. Not as much after they had pulled this up, I could breath very good then.

Q. Pulled your chest up? [80]

A. Yes.

Q. What kind of an apparatus did they put on your chest to pull your chest upward?

A. They had wires in here, made a line in it and they put a hook through it and then there was a cord or rod or something that went up and over my bed.

Q. Then did you find out if you had any pains in your chest from any fractured ribs?

(Testimony of Mrs. Jennie Duff.)

A. Yes sir, I had pains through my chest and I had a lot of pain in my back.

Q. In your back on which side, with reference to the ribs, on what side?

A. Well, I couldn't turn——

Q. Where was the pain? You talk about your ribs in back and on which side of the body, your right or left in back?

A. I was lying on my right side and I couldn't turn over on my left side and I asked the doctor why. It seemed so I couldn't turn over. It was because I had broken ribs on that side.

Q. That would be in the left rear portion that you had some fractured ribs? A. Yes.

Q. Now with reference to your back itself, the middle of the bed was higher than your feet and head, is that correct? A. That is right.

Q. Did you notice anything about your back?

A. I noticed my back hurt, but I didn't know it was broken. I knew it was hurt.

Q. And then how about any pains in your head?

A. Yes, I had pains.

Q. Describe that as to the severity of the pains, when you were still in the hospital at Elko.

A. I pained all over, but I think they kept me under sedatives and I didn't realize it. It hurt me all over. I didn't realize it until I got better.

Q. After you got better, you say you started realizing you had some pains?

A. Yes.

(Testimony of Mrs. Jennie Duff.)

Q. How about your head? Did you have any headaches while you were still in the hospital?

A. Yes.

Q. Where were the pains in your head? Describe them.

A. This eye mostly.

Q. You are pointing to your left eye. That is here for the record.

A. My left eye, in my eye and through my head.

Q. You are pointing to the left side of your head?

A. Yes sir.

Q. What did you notice there?

A. That is where the most severe pain was.

Q. Was that on the outside or inside? [82]

A. Of my head?

Q. Yes.

A. It was all through it.

Q. Inside of your head as well as out?

A. Yes sir.

Q. Did you have pain on the top of your head on the left side while in the hospital?

A. I had pain along here, the left side, going back here and around back this way.

Q. That would be pointing on the right side and up towards the crown of the head, is that correct?

A. Yes.

Q. How about the middle part of your head, did you feel any pain?

A. Yes.

Q. When you left the hospital at Elko, did you walk or go out by stretcher, or how?

A. When I left the hospital, I walked with some one helping me. I had my son and husband help.

(Testimony of Mrs. Jennie Duff.)

Q. Supporting you on each side. Now you went in an automobile, I take it, from there to the Elko airport? A. Yes.

Q. And by air ambulance to Burley?

A. Yes.

Q. And then when you got to Burley, I take it, you probably went by car to your home, is that correct? [83] A. That is right.

Q. Now at home did you go to the hospital or did you stay at home in Burley?

A. I stayed at home.

Q. And did you have any x-rays taken?

A. Yes sir.

Q. Who was your doctor in Burley?

A. Dr. Trehune.

Q. Dr. Charles Trehune? A. Yes sir.

Q. How long did you stay under the care of Dr. Trehune, or are you still under his care?

A. I am still under his care.

Q. When you left the Elko hospital, did you have any cast on? A. Yes sir.

Q. Describe that, what kind of a cast and where it was.

A. It came from my head, so my neck couldn't move and I held my head back that way.

Q. It was pushing your head backwards?

A. Yes, way back.

Q. Then how far down?

A. And down past my hips.

(Testimony of Mrs. Jennie Duff.)

Q. So your entire body, then, from the hips up to your head?

A. Not my arms, my entire body.

Q. Was encased in a cast? [84]

A. That's right.

Q. How long did you keep that cast on that you described; in other words, the full cast, together with the thing that held your head back? How long did you keep it on in the position of pushing your head backwards? A. Six months.

Q. So that would be some time in June of 1955?

A. I think I looked it up. I kept a diary and I think it was the 27th of June that it was taken off.

Q. So you had your head pushed up backwards until about June 27, 1955? A. Yes.

Q. Then did you have any further types of casts or braces put on?

A. Yes, they took the cast off and put a brace on that still held my head up this way, but not so far back as the cast did.

Q. Now where did you go to get that brace?

A. I went to Boise.

Q. Do you remember the name of the doctors there in Boise? A. I have forgotten it.

Q. While you had that cast on your back and your head pushed backwards, were you able to eat?

A. While I had the cast on?

Q. If you were able to, describe how you did.

A. Well, I ate standing up.

Q. You were not able to sit down during that six months to eat? [85] A. No.

(Testimony of Mrs. Jennie Duff.)

Q. How about when you tried to sit down?

A. When I sit down the cast would come up so far I couldn't move my jaw. I couldn't make it work when I was sitting down and when I was standing up, I had to lean forward on something, like this, so my jaw could work.

Q. What did you notice with reference to going to sleep at night? Was there any discomfort at all?

A. Yes sir. I had to sleep in my cast. It was very uncomfortable.

Q. And at first when you went home at Burley, were you up part of the time or up all the time, or what was the situation?

A. I was in bed most of the time at first. I would say the first three months I was in bed most of the time.

Q. When you had the cast on, could you sleep on your sides or just on your back?

A. While I had the cast on, I could sleep on one side, my right side. I couldn't turn over because these ribs still hurt me to lay on the other side.

Q. That would be on your left side, was it?

A. Yes.

Q. Before the cast was taken off, did you notice any pain about your chest?

A. Well, other than I felt smothering at times. I don't know if that was my chest. [86]

Q. After the cast was removed about June 27th, how was your chest by that time?

A. After my cast was removed—I didn't understand that.

(Testimony of Mrs. Jennie Duff.)

Q. Well, the cast was taken off about June 27, 1955?

A. Yes sir.

Q. How was the middle of your chest and front of your chest at that time?

A. I don't know about my chest, but I had such a pain in my back it came right through upon my ribs and right through me. Whether it was caused by the chest or whether from my back, but it came right through.

Q. What was the severity of that cast?

A. Well, it would make me nauseated, it would hurt so bad.

Q. Would that pain come and go or were you free of pain part of the time?

A. It would seem if I could lie on my back, for instance, all night, then I wouldn't have much pain in the morning. You are talking about after I had the cast removed?

Q. Yes, after you had the cast removed and had the back brace.

A. But when I got up and around, the pain would start.

Q. And while you had your back brace on, were you able to sleep on either side?

A. No sir. I still had to lie over on my back.

Q. At the present time?

A. Yes sir.

Q. And if you lie on either side, what do you notice? [87]

A. It pains me and it smothers me.

Q. When you first got your back brace—do you still wear that?

(Testimony of Mrs. Jennie Duff.)

A. I still wear the back brace but not the neck piece. I took that off about a month ago.

Q. Do you take the back brace off part of the time? A. To sleep.

Q. With reference to this part that held your chin up, you don't wear that now? You haven't got that part on?

A. No sir, I don't wear that now.

Q. When was that part taken off that held your head back?

A. Oh, more than a month ago. When I came down to the deposition I had it off about two weeks.

Q. The depositions were taken September 19, 1955, so about two weeks before that?

A. Yes.

Q. Have you got your cast on now?

A. Yes sir.

Q. Could you stand up and just point out about where it comes up and where it goes?

A. Well, it comes from my hips around here and up here. It held my back straight.

Q. And that is the top? A. Yes.

Q. And that is pointing up to a point just a little above the shoulder, is it not? [88]

A. Yes sir.

Q. And that goes down to the hips?

A. The hips.

Q. Are there straps going around you to hold you firmly? A. Yes sir.

Q. But no metal brace or anything in front?

A. No.

(Testimony of Mrs. Jennie Duff.)

Q. Do you have any pain at the present time?

A. Yes sir.

Q. And tell us about that. Where do you notice pain?

A. I have had a lot of pain in my neck. It still hurts me to turn my head too far.

Q. Now you are pointing, for the sake of the record, to the right?

A. Yes sir. I can turn it a little farther to the left without hurting me.

Q. And when you move it up and down, tell us about that.

A. It doesn't hurt me so much to move up and down.

Q. Now with reference to your back, do you notice any pain?

A. Yes sir, I still have severe pains in my back.

Q. Are you free of pain at any time during the day?

A. Yes sir.

Q. What times of the day?

A. As I say, when this pain gets real bad, I lie down. The doctor told me to try to leave the brace off as much as I [89] could, but it hurts worse when my brace is off, so I will leave it off once in a while, but as long as I can lie on my back—I mean, when it gets to hurting, I lie down or I go put my brace on and it doesn't hurt so bad.

Q. You say you still have to sleep on your back?

A. Yes sir.

Q. And as you are up and around the house

(Testimony of Mrs. Jennie Duff.)

during the day time, does your back then start bothering at times? A. Yes sir.

Q. Tell us about any eye conditions?

A. Oh, my eye pains me a lot.

Q. Which eye is that?

A. That is my left eye.

Q. What have you noticed about your left eye?

A. I don't see as well with it and it hurts me so to read, gets red and things blur with it when I read.

Q. Did you have any cuts on the eyelid?

A. I had something on the eyelid, I don't know what it was, but anyway it would swell and then break and then it would swell and break for about three months.

Q. That was three months from the time of the accident? A. Yes sir, after I got home.

Q. Did you go to somebody to be treated for that? A. Yes sir.

Q. Who was that? [90]

A. Well, that was an eye doctor in a way; he was an M. D. that had studied about eyes.

Q. What was his name?

A. Dr. Enmore.

Q. In Burley? A. No, Ruppert.

Q. That is a nearby town?

A. Yes sir, ten miles.

Q. Then do you have a scar on you from a cut?

A. On my eye?

Q. Well, or somewhere—yes, your eyelid?

(Testimony of Mrs. Jennie Duff.)

A. My eyelid has a scar on it from this thing that kept swelling and breaking.

Q. On your forehead is there any condition?

A. Yes, there is a cut about over here clear over in here.

Q. Let me, for the sake of the record, describe that if I may and see if I describe it correctly. A cut on your right forehead approximately about the right side of it.

A. If I had a looking glass—somewhere along in here.

Q. For the sake of the record, it starts at a point about the right eye and I would say approximately about three-quarters of the way towards the outside. Is that about correct? Then it goes almost directly across the forehead up more towards the left eye and zigzags.

A. And there is a cut in here too. [91]

Q. That is just about the left eyebrow, a little to the back of the left brow, edge of the left eyebrow. I think that is more or less generally. The doctor can describe it better.

Mr. Wright: I assume neither you or Mrs. Duff have any objections to members of the jury looking closely at Mrs. Duff's forehead. They might be interested in looking. I know Mrs. Duff does not like to be peered at at close range, but members of the jury would you like to see these scars just referred to.

The Court: We are about to recess, Mrs. Duff.

Before we do, you might walk down before the jury.

Jury admonished and recess taken at 11:00 a.m.

11:15 a.m.

Presence of the jury stipulated.

Dr. Clarke sworn and testified.

MRS. DUFF

resumed the witness stand on further

Direct Examination

Q. (By Mr. Wright): Mrs. Duff, I think I was about the point with reference to this cast, and if the Court please, I would like to have this photograph marked for identification.

The Court: The photograph may be marked plaintiffs' Exhibit 14.

Q. Mrs. Duff, I show you plaintiffs' Exhibit 14 for identification—I will not go into details—but do you——

Mr. Pike: May I suggest you ask first when and where [92] the picture was taken?

Q. When was this picture taken?

A. We had the picture taken in July, but it laid in the camera until August—I mean the latter part of June—and just had it left in the camera before I had it developed.

Q. Was this taken when you still had the body cast on? A. Yes sir.

Q. So it would be some time before June 27, 1955? A. Yes sir.

(Testimony of Mrs. Jennie Duff.)

Q. Would it be in the month of June?

A. Yes sir.

Q. Does this photograph show you in the cast?

A. Yes, and my niece.

Mr. Wright: At this time I would like to introduce this in evidence for the purpose of showing this particular cast.

Mr. Pike: May I ask a couple of questions?

Q. (By Mr. Wright): That picture was taken at Burley?

A. Yes sir, in front of our house.

Q. (By Mr. Pike): Who took the picture?

A. My niece's husband, Mr. Gray.

Q. Approximately how long after that was the cast removed? A. It wasn't too long.

Q. Within a week after the picture was taken?

A. Oh, not that soon. Probably two or three weeks before.

Q. When you talk about the brace, you still had the brace you [93] wore on your back?

A. Yes sir.

Q. But when you are talking about the cast, you are talking about the portion which held your neck up?

A. My cast was all in one piece, sir, but my brace is in two pieces, but my cast was in one piece.

Q. Then I understand that this was your cast?

A. That was my cast. It was all one piece, that held my head up and went straight down, one piece.

Q. So I won't get confused on that—after the neck portion of your cast was removed, were you

(Testimony of Mrs. Jennie Duff.)

thereafter given a neck brace? A. Yes sir.

Q. And did you wear that neck brace up until about the first of September, from June to September? A. Yes.

Q. And you no longer wear it, is that correct?

A. That's right.

Mr. Pike: No objection.

The Court: You have offered that in evidence?

Mr. Wright: Yes.

The Court: The picture will be admitted under the same number as identification, No. 14.

Mr. Wright: If the Court please, before I pass it, may I ask a couple of questions to clarify it?

Q. In the photograph you were to the right of your niece and [94] looking at the picture would be this way. Now there is something white below the lady's chin. What is that below your chin?

A. It is my cast. The white shows my cast.

Q. That is the cast?

A. Yes, and this black spot on there, they had to saw out that, I couldn't breathe. I could breathe, but I couldn't talk, it pressed in on me here and so they cut a hole around here to give me room, so I could talk and it shows up black.

Mr. Wright: May I pass this to the jury?

(Exhibit 14 passed to the jury.)

Q. Mrs. Duff, at the present time I think you spoke of a numbness after the accident of your forehead and into the scalp? A. Yes sir.

Q. Now tell us about that condition, if that has improved or what is the situation today?

(Testimony of Mrs. Jennie Duff.)

A. The numbness goes back, as I say, right like this, to about here, to the middle.

Q. Let us try to describe that for the record.

A. That is numb now.

Q. Does the numbness start at the edge of each of the scars, or approximate edge?

A. Right across the scar.

Q. And about the right side of your forehead where the numbness is, does it go over that far?

A. Yes sir. [95]

Q. And then it goes backward to the top of your head. Does it go back to what you might call the crown of the head, does it go back that far?

A. Yes.

Q. Can you feel anything in that area?

A. No sir.

Q. Does that cause you any discomfort?

A. I don't suppose that does, but I have an awful headache. I don't know whether that has anything to do with it or whether it is my eye that causes the headache, or what does, but it is around this eye, and as I say, it zigzags here and around this side.

Q. Now at the present time do you have any headaches at all? A. Yes sir.

Q. Tell us about how frequent or infrequent, or whether that is a steady condition. In other words, we want to know what the condition is.

A. I have headaches real often and it seems I will feel quite free for a little while and all at once

(Testimony of Mrs. Jennie Duff.)

it will start coming and it will help it to lapse if I can lie down and go to sleep.

Q. How about your condition of your nervousness, or anything of that type? What is the situation at the present time?

A. It affected my nerves.

Q. Now before the accident occurred, you were living in Burley, is that correct? [96]

A. Yes sir.

Q. And you folks have your own home?

A. Yes sir.

Q. And do you hire any work in your home?

A. We had a lady come in to do the work.

Q. Before the accident?

A. After the accident. I had no help before.

Q. You did your own housework before the accident?

A. Yes sir.

Q. How about your laundry before the accident, did you send that out?

A. No sir, I always did my own laundry.

Q. What was the condition of your health before the accident?

A. I had good health.

Q. And what was the condition of your ability to remember?

A. Well, I had a good memory.

Q. Since the accident have you had any trouble?

A. Yes, I have not been able to remember like I did before.

Q. Now after the accident, you have had to have help, is that right?

A. Yes sir.

Q. Your husband can more or less testify to that, can't he?

A. Yes.

(Testimony of Mrs. Jennie Duff.)

Q. With reference to your household duties at the present time, do you do your laundry? [97]

A. No sir.

Q. You send all that out? A. Yes sir.

Q. How about ironing?

A. I can't iron. It hurts.

Q. It hurts you where?

A. My back. It is my back that hurts.

Q. How about sweeping?

A. I can't sweep either.

Q. And tell us why you can't do that?

A. Because it hurts my back.

Q. And then do you do the cooking?

A. I do most of my cooking, yes.

Q. Can you lift, say a pot of water, like you did before? A. No sir.

Q. And what do you notice about that?

A. Well, it hurts me to lift. I can pull things, I pull instead of lifting.

Q. How about washing and wiping dishes?

A. Well, my husband still helps me with it.

Q. Before the accident, did you do your own dishes? A. Yes sir.

Q. Mr. Duff took care of paying the doctor bills and different nurses, etc? A. Yes sir. [98]

Q. He can testify about that, can't he?

A. Yes sir.

Q. With reference to the lady helping you, he can testify about that too? A. Yes sir.

Mr. Wright: I believe that is all.

(Testimony of Mrs. Jennie Duff.)

Cross Examination

Q. (By Mr. Pike): Mrs. Duff, generally about the woman coming in to help with the ironing, she comes in about every couple of weeks, doesn't she?

A. About the ironing, I have most of it down at the laundry. She comes in once in a while to do maybe a few pieces that the laundry hasn't finished for me, or maybe she will take something and wash it out for me that I can't send to the laundry. She irons most of it.

Q. Does Mrs. Gordon still come in to help?

A. Yes sir.

Q. And she probably comes in say every two weeks?

A. Just once in a while, when I think my house is too dirty, I have her come in and clean it up.

Q. Is there any one else comes in besides Mrs. Gordon?

A. No sir, just my son and my husband, just the three of us.

Q. That has been true generally since you got out of your cast?

A. Yes sir.

Q. And your son is now 18 and he lives at home with you and Mr. [99] Duff?

A. Yes sir.

Q. You were in the Elko hospital for about three weeks and two or three days before you left the Elko hospital, you were able to get up and walk around, were you not?

A. Yes sir, but mostly some one helped me. What I mean, I just couldn't run around by myself. I had to have help.

(Testimony of Mrs. Jennie Duff.)

Q. So when you left there, that was about say the 21st, three weeks after the 31st of December, 1954? A. Yes sir.

Q. You were able to walk? A. Yes sir.

Q. Since then is it true that you haven't been in any hospital at all, except to go to the hospital at Burley to have X-rays taken, or possibly to have the cast removed, or something of that sort?

A. Yes.

Q. In other words, you have not been a patient in the hospital? A. That is true.

Q. And you have made some trips to see the doctor in Burley about your condition, is that correct?

A. Yes sir, he has been treating me.

Q. Now after you had the cast removed, or the neck portion, you were given a neck brace of the type you sometimes see people wearing, with a leather lining, holding their chin up? [100]

A. Sir, I didn't have the cast removed part at a time.

Q. The whole thing was taken off and then part replaced on a back and neck brace at the same time? A. At the same time.

Q. After wearing the neck brace, we will say, from about June until about the first of September, you were able to dispense with that?

A. The neck brace, yes sir.

Q. And since then you have worn the back brace? A. Yes.

Q. Now generally has the doctor advised you to

(Testimony of Mrs. Jennie Duff.)

discontinue wearing that as your condition improves, not all at once, of course, but gradually dispense with wearing the back brace?

A. About the time I was here for the deposition, just before that, I seen Dr. Drehune and he said he thought my back was strong enough that I could try leaving it off, but if it hurt me keep it on, but he said if I wanted to try to leave it off, he thought it might make my back stronger.

Q. Have you been taking your brace off when you go to bed at night for your usual night's rest?

A. Yes sir.

Q. And you commenced leaving it off during your night sleeping hours before September of this year, did you not? A. Yes sir.

Q. And you have been able to get along without continuous since [101] at night? A. Yes sir.

Q. Now generally, Mrs. Duff, you get your night's rest over a period of about eight hours, about eight hours in bed? A. Or nine.

Q. Generally eight or nine?

A. Sometimes ten if I feel tired.

Q. Then the rest of the time you are up and about the house dressed, is that true?

A. I dress, yes.

Q. Has that generally been true since, oh say before September of this year?

A. It is. That has been true since I had the back brace on.

Q. And as to your neck condition, do you feel that you now are able to move your head without

(Testimony of Mrs. Jennie Duff.)

any particular discomfort? I notice while you are there, you are at least able to look from left to right.

A. It doesn't hurt me to move up and down, but it hurts to move too far to the left or right. I can move it some.

Q. But generally if you don't force your head around when you look, you are able to do that without discomfort?

A. If I don't turn my head too far. If I turn too far, it hurts.

Q. If you look at that edge of the jury box and over at the bailiff's desk, you are able to do that without discomfort, aren't [102] you?

Mr. Pike: That is all.

Redirect Examination

Q. (By Mr. Wright): What was your weight before the accident?

A. My weight was 124-125.

Q. What do you weigh now?

A. I weigh 105. I weighed 108 at the deposition, but Dr. Collette weighed me the other day and I weighed 105.

Mr. Wright: That's all.

Jury admonished and recess taken at 12:00 noon.

Afternoon Session—November 8, 1954

2:00 p.m.

Dr. Harry B. Gilbert sworn and testified.

Wednesday, November 9, 1954—10:00 a.m.

Presence of the jury stipulated.

The Court: Which one of you gentlemen wish to read into the record the stipulation made in chambers?

Mr. Wright: I can do it, if the Court please. We should probably put up the highway map on the board to call to the attention of the jurors the different points.

Members of the jury, both plaintiffs' attorneys and the attorneys for the defense have stipulated as to the map in connection with this action, so I will give you what the map more or less shows, in other words, the stipulated facts. This is an engineer's drawing of a plane of the portion of the [103] highway in the area where the accident happened. Now there is designated a piece of chrome metal at highway station—there are highway station marks at different places; in other words, there is a certain station and identical one there to find these numbers and you can figure up the number of feet at any time by taking 24600 and then take the next station, which is 1247 and which would mean 1247 feet and that would represent—in other words, would be 25847 feet where the chrome is from this guide post, and the metal chrome we have stipulated that is where the accident occurred, and Mr. Settlemyer has stipulated for his deposition and has brought this down to the plane part of the line marked "WS", in other words, W. Settlemyer, and that would come down on this point on the bottom, which would be the same place, and then going to the east generally—north is to the top of the map—would be the same way on the highway, and east would be

back toward Elko. Generally the highway runs east and west. There are changes as you go along, but call it generally east and west, so north toward the top and back towards Wells would be east and towards Elko is west.

Now indicated up under here is a guide post and it is indicated on this other graph cut and guide post. Now this shows a 3.34 per cent grade. That means in every 100 feet, going from east to the west, when you pass over the crown of the hill, it drops down 3.34 feet for every 100 feet traveled. In other words, you travel 100 feet as you go over the crest, but [104] down the hill you will drop 3.34 feet in every 100 feet.

Now you will notice the scale is one inch equals one hundred feet. The engineers in the State Highway Department, in making their planes will show the curvature by scale of one foot equals 10 inches. One inch equals 100 feet on the horizontal, and this second plane shows a vertical, where one inch equals ten feet. Now in order to correct that, because you have two maps with different scales, the engineers have also drawn a map showing the highway the same at the top and with the vertical above it, with the curvature at the same scale as the horizontal and the grade of 3.34 per cent.

Now it has been stipulated that the highway where the chrome was found, the width of it there is—this was measured by William Settlemyer, the engineer—and starting on the north side of the highway, in other words, where the chrome is, start-

ing at the north edge of the road, there was three and one-half feet of gravelly shoulder running north and south, with some pavement mixed up, then there is four feet of what appears to be a shoulder. That would be a black-top shoulder, and there was $14\frac{1}{2}$ feet of hard pavement; in other words, $14\frac{1}{2}$ feet from the center of the north side would be asphalt pavement, then there would be four feet black-top shoulder, then three and one-half feet of gravelly shoulder, from the center going northward.

Now from the center line going south from the chrome, you have on the south side of the center line 13 feet of hard [105] pavement and 8 feet of shoulder, making that total width of 43 feet; in other words, a total width from the outside shoulder on the north to the outside shoulder on the south is the distance of 43 feet. The distance from the center line to the north edge of the shoulder would be 22 feet. In other words, on the north side, where the chrome is, from the center line, from there to the outside shoulder is 22 feet; from the center line to the outside of the shoulder on the south is a distance of 21 feet and 13 feet armoured pavement and 8 feet being shoulder, it would be about the same composition of the other; that is, tar is spilled over and the gravel would be about the same. That armoured part south of the center line to the edge of the armoured part is 13 feet. Then there is black top shoulder $6\frac{1}{2}$ feet and then $2\frac{1}{2}$ feet of gravel and black stuff mixed together.

Juror: May we have the engineer's report?

Mr. Wright: I guess there would be no objection to typing up that much.

Mr. Pike: I can see no objection to that. The testimony of Mr. William Settlemeier contains questions and answers. As far as we are concerned, that portion referred to has been typed. Part of it is on page 8.

Mr. Wright: So stipulated, that we type it up and notice it as an exhibit and used as testimony of W. L. Settlemeier.

Now we have some pictures and we will stipulate the pictures and I suppose we should maybe hold them up first and [106] then pass them to the jurors. Would that be agreeable to the Court?

Mr. Pike: Each one say what it is and what it represents.

Mr. Wright: Coming from Wells, Nevada and going west, the first picture that is taken is plaintiffs' Exhibit No. 9, was taken on March 31, 1955 and the road construction, it is stipulated, has not changed from the time of the accident and the time the picture was taken, but as to weather conditions on the highway, that is a question of proof. The first picture was taken 6/10 of a mile east of where the chrome was found, looking toward the west; and you can see the crown of the hill and the other pictures you can see more detail. That is 6/10 of a mile east of the chrome, looking west, and the camera was set by a person sitting in the automobile and the camera setting on the highway and the camera lies exactly in front. I was sitting in the automo-

bile and the camera setting here and is exactly in front.

The next picture, as you come closer, is 4/10 of a mile——

Mr. Pike: Wouldn't it be all right that we can make a notation on Plaintiffs' Exhibit 9, for example, that it was taken 6/10 of a mile east of the chrome on the highway and then we won't have to have any part of Mr. Fox's testimony.

Mr. Wright: All right, 6/10 of a mile east of the chrome looking westward. [107]

The next picture, Exhibit 10, is taken 4/10 of a mile, measured by the speedometer of the automobile, plus 60 feet from the chrome, east of the chrome on the highway. This is Plaintiffs' Exhibit 10, shows the same highway, but going farther westward toward the crown of the hill, and the camera was set looking westward and the carton that is on the highway there is 4/10 of a mile plus 60 feet east of where the chrome was, looking westward.

Mr. Pike: If I understand that, the carton seen on the highway is 4/10 of a mile east of where the chrome was and the camera was set up 60 feet east of the carton.

Mr. Wright: Yes. May we have that marked, camera setting 4/10 of a mile plus 60 feet east of the chrome, looking westward.

Now the next one is Exhibit No. 11—these were all taken on the same day and within a few minutes, in all pictures the camera setting at that same angle

—it is taken at this paper carton 4/10 of a mile east of the chrome, looking westward.

Mr. Pike: In other words, it is 4/10 of a mile from that first car you see.

Mr. Wright: Notice the car which is somewhat in the west-bound lane. That is where the piece of chrome was found point of impact. Now it is stipulated, not undertaken to be the same position of the car on the highway, only to identify [108] where the chrome was off the shoulder. This picture is taken 4/10 of a mile eastward of where the chrome was, looking westward down the highway, again the camera setting right up. It is stipulated the picture was taken 4/10 of a mile east of the chrome, looking westward.

Now this next picture was taken $3\frac{1}{2}/10$ miles east, looking westward, the same date, March 31, 1955, camera pointed westward. The car was in the same position as before, opposite the camera, and it is $3\frac{1}{2}/10$ mile. Now it is stipulated that we may write on the back that this picture, No. 12, was taken $3\frac{1}{2}/10$ miles east of the chrome, looking westward.

Mr. Pike: Three and one-half tenths is, of course, .35 of a mile, 35/100 of a mile, east of the chrome on the highway. In this last picture, is there some object there?

Mr. Wright: The same automobile, in the same place.

Mr. Pike: This is taken substantially 264 feet closer than Plaintiffs' Exhibit 11.

The Court: Now in simple language we have

four pictures here, one being taken approximately the crest of the hill, looking west toward the scene of the accident; the second picture closer to the scene; the third closer yet and the fourth closer. Are these pictures in sequence in distance—closer, closer, closer.

Mr. Wright: That is right. Now we have some [109] more photos of Mr. Duff's De Soto. These pictures were taken by a large camera in the Page garage and following the accident and approximately on January 4, 1955. It is stipulated that the flash photo is not in color and that the color of it is not shown by the flash camera, and also that details of the damage can be seen, but more detail can not be shown.

Mr. Pike: In other words, we agree that these three photographs Mr. Wright is exhibiting to the jury now, do represent the Page tow car, taken inside the garage, but they do not fully show the color and do not show the full extent of the damage.

Mr. Wright: This happens to be the De Soto automobile. The same stipulation applies to both of them. The first one shows the De Soto after the accident, the right side of the car. Now No. 2 is the picture taken by flash camera in the Page garage after the accident of the Duff car and shows the front end. The next picture, 3, shows the plaintiffs' car after the accident.

Now to conserve a little time, we are going to show you four photographs of the defendant's truck following the accident. These were taken the

same day as the Duff car, January 4, 1955, in the Page garage, same camera and with flashlight and the same stipulation applies, that it shows, as far as visible, the physical damage and what it shows as to color, that is subject to objection. It is only black and white and doesn't show. [110]

Mr. Pike: We are not stipulating it shows all the damage.

Mr. Wright: No, but as much detail as could be shown in these particular pictures.

Mr. Pike: That is right.

Mr. Wright: This series of pictures, Exhibits Nos. 4, 5, 6, and 7—one picture is more or less duplicate of No. 6 and 4 is more or less duplicate, all left front, and No. 6 towards the rear.

There are three pictures, which are defendant's Exhibits Nos. A, B, and C. They were taken some time later, after the truck, Page wrecker truck, had been repaired and repainted. It was taken at Wells, Nevada, approximately opposite the Page garage.

Mr. Hanson: That paint was the same paint as originally.

Mr. Wright: They could not paint with the same paint.

Mr. Hanson: Well, same color.

Mr. Wright: It think that is subject to proof. We will not stipulate that.

Mr. Pike: In other words, we contend that the photographs correctly depict the appearance of the Page truck prior to the accident.

Mr. Wright: That is your contention. At any

rate, it does show that it is repaired. The same stipulation, the [111] picture does not show the color, that is subject to proof, because it is a black and white camera, and this was repainted after the accident, repaired and fully repainted, before the picture was taken.

Mr. Pike: I don't know whether it was fully repainted or not; it was painted with fresh paint, at least in part. We will have testimony.

Mr. Wright: This next picture shows the U-Haul trailer that was involved in the wreck, and it was taken outside the Page garage January 4, 1955. The color is subject to proof, because it is black and white and does not show the color. Flash camera.

I call attention of the Court that the map that has been placed on the board, No. 13, and by stipulation we have, and did offer it in evidence as part of the record in this case.

Mr. Pike: No objection.

The Court: The map is already admitted.

Dr. Hugh S. Collette sworn and testified.

Jury admonished and recess taken at 12:05.

November 9, 1954—Afternoon Session

1:30 P.M.

Presence of the jury stipulated.

Joe Mendive sworn and testified. (See transcript attached page 361.)

EARL REMINGTON

a witness on behalf of the plaintiff being duly sworn, testified as follows: [112]

Direct Examination

Q. (By Mr. Wright): Your name is Earl Remington? A. Yes sir.

Q. And you live where? A. Salt Lake City.

Q. And your address please?

A. 748 E. South Temple.

Q. You work for the Interstate Motor Lines?

A. Yes sir.

Q. How long have you worked for Interstate?

A. Five and one-half years.

Q. And in that capacity, employed by the Interstate Motor Lines, which operates a large motor service, semi-trailers, have you had occasion to go over U. S. 40 from Salt Lake City to Elko?

A. Many times.

Q. And on December 31, 1954, were you in an Interstate Motor truck? A. Yes sir.

Q. And you were going where?

A. East, between Wells and Elko.

Q. From Elko to Wells, going east?

A. From Elko to Wells.

Q. Who was driving from Elko, Nevada, east?

A. I was.

Q. Were you accompanied by any one? [113]

A. Neal Seacrest.

Q. Is that one of those sleepers, where these drivers of them sleep and you change driving every so often? A. Yes sir.

(Testimony of Earl Remington.)

Q. And was Neal asleep during that period from Elko on about to 14 miles west of Wells, Nevada? A. No.

Q. Now what was the condition of the road as you left Elko and as you approached Wells?

A. Snowstorm in Elko and as we approached farther east we went, the snowstorm lessened out. The road was awfully icy.

Q. Did you come to a point about 14 miles west of Wells, Nevada? A. Yes sir.

Q. Did you see anything which attracted your attention?

A. Well, as we got to the ridge—I didn't know at the time—saw something and the closer I got to it I recognized it as the wrecker trying to pull some one off the road back on the road.

Mr. Hanson: I think the witness should answer for himself, not the man with him.

A. I am sorry, sir.

The Court: Well, I think the members of the jury are familiar with the fact we often say "we" when we mean "I." This witness speaks for himself.

Q. Can you identify what wrecker truck you saw? [114] A. Yes sir.

Q. And had you ever seen it before?

A. Oh yes.

Q. And had that same wrecker, on one occasion, helped you out of some difficulty?

A. It had.

Q. And you knew it quite well?

(Testimony of Earl Remington.)

A. Yes sir.

Q. Had you passed through Wells, Nevada, many times on that road?

A. Three and four times a week.

Q. Whose wrecker was it?

A. Page garage wrecker, Wells, Nevada.

Q. As you approached it, what speed were you going?

A. We were travelling about 20 to 25 miles an hour.

Q. On your right-hand side?

A. On my own side, travelling east.

Q. As you approached the wrecker, did you see any car, either coming down the hill or somewhere in the vicinity?

A. Automobile headed west. I slowed so he could go around the front end of the wrecker before I proceeded in my own lane of traffic east.

Q. Do I understand this automobile passed the wrecker before you passed the wrecker?

A. Yes.

Q. In doing so, the automobile went on which side of the road? [115]

A. South lane of traffic coming east, on east-west road.

Q. Did you see, as you approached the wrecker, anybody around the wrecker?

A. Oh, I saw a couple of fellows behind and one man standing in front of the wrecker, flagging traffic.

Q. Can you recognize the fellow?

(Testimony of Earl Remington.)

A. Mr. Page, the owner of the wrecker.

Q. Do you recognize him here?

A. Sitting at the table.

Mr. Wright: He is pointing to Mr. Page in the court room, for the sake of the record.

A. Yes sir.

Q. What speed did you go by the wrecker?

A. Oh, about 20 miles an hour.

Q. How close did you pass by the wrecker?

A. Oh, I would judge within three or four feet of the front end of the wrecker.

Q. Did you look at the wrecker as you approached and went by? A. Yes, sir.

Q. Tell us what, if you noticed, as to any lights or anything burning on the wrecker?

A. As far as I recall, there were no lights whatsoever appearing on the wrecker.

Q. And you are familiar with the fact that the wrecker had a dome light? [116] A. Yes sir.

Q. Did you see that flash on and off?

A. Not that I recall.

Q. Where was the front end of the wrecker?

A. Sitting approximately in the south lane.

Q. Where was the wrecker standing, which direction?

A. Standing about northwest direction, back to the shoulder of the highway.

Q. Was there anything to the north of the highway itself, down in the barrow pit?

A. A black Ford automobile, pulling a 2-wheel trailer.

(Testimony of Earl Remington.)

Q. What distance separated, if any did, the rear of the wrecker and the north edge of the shoulder?

A. Oh, I would judge somewhere in the neighborhood of four and six feet.

Q. And then what was the condition of the road itself, the covering, if any, leading up to the wrecker?

A. It had between a quarter and half inch of ice and you could see the highway through the ice.

Q. And as you passed the wrecker, what was the condition of the road there, the covering?

A. From there to the top of the crest of the hill, where we finally stopped the truck, it was still icy and after the top of the hill, the ice lessened out, was not so much.

Q. As you passed the wrecker, did you see any cars coming [117] over the summit, or coming down that stretch to the wrecker?

A. When I got about half way between the wrecker and the curve of the hill, a car came over the crest of the hill.

Q. Did you later identify that as belonging to certain people?

A. Yes sir.

Q. Who were the people?

A. I later found out it belonged to Mr. Duff.

Q. You say you were about how far up the hill when you saw him coming over the crest?

A. About half-way.

(Testimony of Earl Remington.)

Q. Then tell us what you did and what the automobile approaching did.

A. Knowing the west-bound lane of traffic was blocked by the wrecker, I knew the condition of the road, I tried to signal Mr. Duff to let him know the road was blocked, by turning on the headlights of my truck.

Q. How many times did you do that?

A. Twice.

Q. And then did you proceed up the hill?

A. Yes sir.

Q. And did Mr. Duff pass you?

A. Yes, he did.

Q. In other words, two automobiles had passed without any accident? A. Yes. [118]

Q. Is the Interstate Motor truck equipped with a rear view mirror?

A. Each side of the driver.

Q. How big?

A. About six inches wide and 18 inches high.

Q. In other words, an unusually big rear view mirror? A. Yes sir.

Q. Can you see, by looking into the rear view mirror, a car to the rear?

A. You bet you can.

Q. How soon can you pick it up as it goes by?

A. You can pick up a car within two feet of the back end of the trailer, clear on for a quarter of a mile.

Q. After the De Soto car went by, tell us what, if anything, you did as to looking?

(Testimony of Earl Remington.)

A. I watched the rear going down hill.

Q. Where did you pick it up in the rear view mirror?

A. Just as he passed the back end of the trailer.

Q. Did you notice, as to the rear end, as to whether or not there was anything that attracted your attention to the rear end?

A. Stop lights.

Q. Was that his brake lights? A. Yes sir.

Q. How far down the hill did you keep the De Soto car in your [119] rear view mirror when it passed you, when you picked it up in the mirror? How far did you notice it?

A. I noticed it until the impact of the accident.

Q. Tell us how far you saw that red light up to the time of the impact.

A. As far as I know, the spot lights of the De Soto car was on from the time he passed me until he hit into the car and he went in a straight line down the north side of the road to about 100 feet of the wrecker, went into sort of a side spin and broadside, hitting the wrecker; would be the left side of the wrecker.

Q. Which side of the automobile?

A. The left side.

Q. During this time was your Interstate Motor Line truck proceeding up the hill?

A. Yes sir.

Q. Then did you stop, or what did you do?

A. As soon as I got up on the hill, where we

(Testimony of Earl Remington.)

could stop safely without the truck sliding and rolling backwards, I stopped, my driver and I got out and went back to the highway.

Q. You stopped on the highway?

A. The shoulder, put our clearance lights on and signal that flashes on the front fender and back of the truck, left it there to go back to the scene of the accident.

Q. When you got up on top, did you go up over the crest? [120] A. Yes.

Q. And then you say you walked back, went back to the scene of the accident? A. Yes.

Q. Did you go down the highway itself or down the shoulder?

A. We walked on the north shoulder of the highway.

Q. So you would have to cross the highway?

A. Yes.

Q. When you stopped on top, did you observe the condition of the highway, the covering or lack of covering, and if so what?

A. Well, the icy covering up there was very slick.

Q. How far eastward did that extend?

A. At that time I didn't know, I hadn't been to it.

Q. You were where, with reference to the crest?

A. Right on the crest.

Q. Then you went down the highway on the north shoulder? A. Yes sir.

(Testimony of Earl Remington.)

Q. As you crossed over the highway, what did you observe as to covering?

A. Very slick. We could hardly stand up on it.

Q. Now did you get anything to put on your feet?

A. Put my overshoes on.

Q. You went down to the scene, did you?

A. Yes sir.

Q. And the wrecker, where was that? [121]

A. The wrecker had been knocked a little bit, the back end, around to the southwest and was still over toward the middle of the highway and Mr. Duff——

(Conference at the bench.)

The Court: Ladies and gentlemen of the jury, you will realize it is difficult for counsel to remember all that is being said and you may have observed from time one of the counsel has requested the reporter to note a certain place in her notes, which means that later this particular counsel will wish to have your attention directed toward that so he may review it and perhaps mention it in his summary. I want to point out that by virtue of that device, you are to give no particular importance or attention to that particular question and answer of the particular witness. Is that satisfactory, gentlemen?

Mr. Pike: That is all right.

Q. Did you look at the highway to see whether or not the wrecker had been moved any distance west?

A. No, I couldn't see as to that.

(Testimony of Earl Remington.)

Q. You didn't make an examination of that detail? A. No sir.

Q. Did you see Mr. Duff around the cars?

A. Yes sir.

Q. What was he doing? [122]

A. He was wandering around in a very dazed condition.

Q. And the two women?

A. The two women, yes, had been in Mr. Duff's car and had been removed from Mr. Duff's car and placed in the car already on the parking.

Q. Did you recognize the Page tow car?

A. Yes.

Q. What happened to the Page wrecker?

A. When it was knocked around there, part of the tow automobile was up underneath the back end of the wrecker. A bunch of fellows there, they were pushing up to get that tow automobile from underneath the wrecker and Mr. Page got in the wrecker shortly after that and proceeded to take it into Wells.

Q. A woman went with him?

A. A woman and a little child.

Q. About what time was it that you pulled around that Page wrecker?

A. Somewhere in the neighborhood of 10 A.M., in the morning.

Q. Around what time did you leave?

A. About 11:20.

Q. And then you proceeded on into Wells?

A. Into Salt Lake City.

(Testimony of Earl Remington.)

Q. With your Interstate Motor? A. Yes.

Q. And did Mr. Seacrest go along with you?

A. Yes sir.

Q. As you got back up into your vehicle, your big Interstate Motor vehicle truck, and you proceeded towards the east, describe the condition of the road as to covering.

A. Down the road a little the icy condition of the road was lessened and finally completely good open and damp highway into Wells.

Q. About where was the damp you stated with reference to the crest?

A. I would say between one eighty and quarter of a mile from the crest of the hill.

Q. And then on into Wells?

A. It tapered. If I remember correctly, the Wells highway was dry.

Q. As you approached the wrecker, what was the condition of the appearance of the highway, as to the color?

A. It would be sort of a white color, but ice on the highway would make it appear like this, white.

Q. And up to where the Page wrecker was standing? A. Yes.

Q. You say you have seen the Page wrecker many times? A. Yes sir.

Q. When you saw it in Wells, where would you usually see it?

A. Sitting right in front of Mr. Page's garage or across the street. [124]

Q. Right in town? A. Yes sir.

(Testimony of Earl Remington.)

Q. Can you tell us then about the color? What was the color?

A. A white top and body blue, the bottom.

Q. And you say it was a blue bottom?

A. Yes sir.

Q. Have you seen that same wrecker since it has been repaired? A. Yes sir.

Q. If I showed you pictures of it, would you recognize the truck? A. I would.

Q. Since the time you have seen it repaired, where have you seen it?

A. Sitting in the same spot, by Mr. Page's garage.

Q. Is there any difference in the color since the repairs than there was the day of the accident?

A. It is a much brighter blue bottom on it now than it used to have before he painted it.

Q. I show you plaintiffs' Exhibit 7 and ask you if you can identify that?

A. Yes sir, that is Mr. Page's wrecker.

Q. Is that the same wrecker you saw?

A. Same wrecker I saw on the highway.

Q. Was it damaged like that?

A. That was after the impact, the accident.

Q. Now this picture, can you identify this? This is defendant's [125] Exhibit A.

A. Yes sir, that is Mr. Page's wrecker since it was painted and sits in front of his garage now.

Q. Tell us what difference, if any, between Plaintiffs' Exhibit 7, the wrecker on December 31,

(Testimony of Earl Remington.)

1954, as the bottom color shows afterward when it was repaired?

A. It has a much darker blue bottom after repaired than it was before.

Q. And before, as you approached it that day, how did it appear?

A. More or less it blended in with the scenery of the highway.

Mr. Wright: I move that be stricken as conclusion.

The Court: It may be stricken.

Q. Just describe the appearance it gave you as you approached as to color, not what it did.

A. What do you mean?

Q. What color it gave you as you approached, the appearance it gave you, not the fact it blended in with anything.

Mr. Pike: That is objected to as leading and also repetitious. He told us what color.

The Court: I think the question has been answered. He said white, with the body blue. Objection sustained.

Mr. Wright: That's all. [126]

Cross Examination

Q. (By Mr. Hanson): Mr. Remington, you said you approached the scene of the accident from the east going west? A. Yes.

Q. How far were you when you first saw the wrecked cars on the north side of the highway?

(Testimony of Earl Remington.)

A. Oh, you could see that bright color for a quarter of a mile, or that trailer.

Q. The U-Haul trailer? A. Yes sir.

Q. Bright yellow? A. Bright orange.

Q. What color was the car that hit the trailer?

A. It was black.

Q. Dark black? A. Yes sir.

Q. You saw that very clearly?

A. Yes sir.

Q. You could see it three-quarters of a mile?

A. Yes.

Q. When you stopped your truck at the top of the hill to the east of the scene of the accident, could you see the car and the trailer, the wrecker, down there? A. Yes sir.

Q. Could you see without trouble or difficulty of any kind? [127]

A. Yes sir, we were looking for it.

Q. Now, Mr. Remington, counsel asked you when you pulled out around the wrecker, going east and before the impact between the Duff car and the wrecker, did you have to pull out around that wrecker or stay in your own lane of traffic?

A. My own lane on the south shoulder of the highway.

Q. At that point where this accident happened, you told us there was ice on the highway?

A. Yes sir.

Q. And you could see through the ice to the hard surface underneath?

A. Yes sir. Quite black ice.

(Testimony of Earl Remington.)

Q. You applied your brakes? A. Yes sir.

Q. Because you could see the black highway?

A. Yes.

Q. At that particular spot you had a black highway? A. Yes sir.

Q. And what you see on top of the wrecker would show up on that black?

A. Unless it is blended in with the scenery and sagebrush on the side of the highway.

Q. And the white top of the wrecker would show on the black ice, we can agree on that?

A. Yes sir. [128]

Q. And would you tell us about where the front end of that wrecker was with reference to the center line of the highway?

A. The front end of the wrecker was setting approximately at the center line.

Q. A little bit to the north of the center line, four or five feet?

A. Three or four inches, not feet.

Q. Did you distinctly make that observation when you went by? A. Yes sir.

Q. You are sure it was not more than three or four inches? A. Yes sir.

Q. How wide would you say the distance was between the front end of the wrecker and what would be the south edge of the highway?

A. The highway is 12 feet wide and six to eight feet shoulder, so there would be 12—20, 21.

Q. Room for two cars to pass?

(Testimony of Earl Remington.)

A. If you got out on the shoulder of the road, yes sir.

Q. The shoulder is black top?

A. Yes, gravel with oil spread over the top.

Q. Hard there, isn't it?

A. Semi-hard surface.

Q. Now you say when you got half way up the hill going to the east, you saw this car coming over the tip of the hill, traveling west? [129]

A. Yes.

Q. Did you form any opinion how fast the car was going at that time? A. I did.

Q. How fast was it going?

A. Between 40 and 45 miles per hour.

Q. You are sure you don't think between 45 and 50? A. No sir.

Q. You have testified at the other hearing involved in this accident? A. I have.

Q. And you remember testifying in Elko as follows, page 170 of the transcript, starting with line 10, you are being asked these questions under oath at that time:

"Q. Tell what you observed as to his speed. Did you form any estimate of his speed?

"A. Well, a man coming up the hill as I was, and a man coming, approaching over the hill, I would figure he was coming a pretty fair rate of speed; he was probably traveling, oh, I imagine forty-five to fifty miles an hour, something in that neighborhood."

(Testimony of Earl Remington.)

You so testified at that time? A. Yes sir.

Q. Was that the speed according to your estimate? A. Yes sir. [130]

Q. You remember at the time you saw this car you were on an icy hill? A. Yes sir.

Q. You knew at that time that the car was traveling too fast for those conditions?

A. For those conditions at that particular spot, yes sir.

Q. It was traveling too fast when it came over that hill on the ice? A. Yes.

Q. That is the reason you blinked your lights, because it was going too fast to go around the wrecker?

A. I blinked my lights to avoid an accident.

Q. You knew he was going too fast to control the car and go around the wrecker?

A. That I wouldn't say.

Q. In fact you told Mr. Page, after the accident, when you walked down to the scene, the reason you blinked your lights was because that man was traveling too fast for the road conditions?

A. That is right.

Q. And that is just your opinion?

A. Yes, just my opinion at the time, 45 to 50 miles was too fast for the existing condition.

Mr. Hanson: That is all. [131]

Redirect Examination

Q. (By Mr. Wright): Now, Mr. Remington, before you arrived at the crest of the hill, did you

(Testimony of Earl Remington.)

know what was over the crest of the hill?

A. No sir.

Q. Now after you got the vehicle stopped and got up over the crest of the hill to Wells, how was the condition? Tell us what the customary speed would be over the hill.

Mr. Hanson: Objected to as having no bearing.

Mr. Wright: Probably not sufficient foundation.

The Court: I am going to sustain the objection. I do not see where it is relevant.

Mr. Wright: It is this, if the Court please, a person is going along and that is what we want to bring out, on top of the other side.

The Court: What do you mean, other side?

Mr. Wright: East of the crest.

The Court: What this witness's customary speed and a person should maintain going over that crossing—objection sustained.

Q. Now you made the statement when he was going up the hill that he was going too fast for the then existing road conditions. When you formed that opinion, you were going up the hill?

A. Yes sir.

Q. And had you known at that time what the condition was over [132] the crest of the hill?

A. No.

Q. Mr. Remington, from the time you passed around by the wrecker, the Page wrecker, were there any cars between the wrecker—in other words, between the wrecker up to the time you saw the Duff

(Testimony of Earl Remington.)

car, were there any other cars in that area?

A. No sir, not that I recall.

Mr. Wright: That's all.

Recross Examination

Q. (By Mr. Hanson): You have driven this western country for many many years, have you not? A. Twenty or thirty years, yes sir.

Q. You know when you get into a cut or go over a hill where the sun hasn't hit, you are going to reach slippery spots, if it is that time in winter?

A. Sometimes, yes.

Q. Of course, you can't see over the top of the hill—you come to the top, you have to expect you might run into that condition?

Mr. Wright: No objection if you will let me ask questions about the top of the hill, but we do object if he is going to ask questions on one side of the hill and on the other. It is calling for opinion and conclusion of the witness, unless he lets me go into it.

The Court: If this is an objection, it will [133] be sustained.

Mr. Wright: I will object to the question.

Mr. Hanson: I will withdraw it, your Honor.

NEAL SEACREST

a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wright): Your name is Neal Seacrest? A. Yes sir.

(Testimony of Neal Seacrest.)

Q. Where do you live?

A. Salt Lake City, 358 West 1050 North.

Q. Are you married? A. Yes.

Q. Now, Mr. Seacrest, it has been testified to here that you were working for the Interstate Motor Lines and on December 31, 1954, you were in an Interstate Motor Line truck and that you had changed at Elko, Nevada and you were proceeding eastward from Elko, Nevada, Mr. Remington was riding in addition up to that point.

A. Yes sir.

Q. Now you went on eastward, did you not?

A. Yes sir.

Q. Did you notice anything in the road when you got about 14 miles west of Wells, Nevada?

A. Yes sir, there was this car that had been off the road and [134] a wrecker there trying to pull it back on to the road.

Q. Did you see any other thing beside the car and wrecker? Was something also on the road?

A. Well, a trailer, car and also a wrecker was getting ready to pull the trailer out.

Q. Now as you approached, did you recognize the particular wrecker?

A. Well, I knew that it was from Wells, Nevada, because I saw it there.

Q. Did you recognize who it belonged to, what garage?

A. I knew it belonged to Mr. Page, but I don't know him.

(Testimony of Neal Seacrest.)

Q. And so as you approached it, what was the condition of the surface of the highway?

A. Well, it was packed down ice or snow like just after a snowstorm.

Q. What appearance did it give you as to the color going up to where the wrecker was?

A. Well, it was just like ice, I would say, packed down, gives a glaring effect, like white, like ice.

Q. That was up to where the wrecker was setting?
A. Yes.

Q. Did that substance cover the entire highway from shoulder to shoulder?
A. Yes.

Q. And the speed of the truck as it approached the wrecker, [135] please?

A. I wasn't driving, but as I recall it had slowed down, so I wouldn't be sure.

Q. Did you see any car before you arrived at the wrecker or after you arrived at the wrecker?

A. Well, there was a car passed just before we got to the wrecker.

Q. In other words, passed going from east to the west?
A. Going west.

Q. The opposite direction; and then, I presume, you kept on and arrived at the wrecker?

A. Yes.

Q. And did you go by the wrecker?

A. Yes, we slowed down. We were observing what had happened.

Q. Did you look at the wrecker as you approached it?
A. Yes.

(Testimony of Neal Seacrest.)

Q. And did you look at the wrecker truck as you went by? A. Yes.

Q. Tell us what lights, if any, you saw burning on the wrecker as you approached and went by.

A. I didn't see any lights at all.

Q. You are acquainted with the fact these wreckers have what we call a dome light on top?

A. Yes.

Q. Did you notice that burning in an on and off condition? [136]

A. I didn't see it burning.

Q. From the time you passed the wrecker, or after you passed the Page wrecker, going up that hill, what was the condition of the highway as to the covering?

A. It was awfully slick and had a small amount of water over this ice, which caused it to be slick on up the hill.

Q. Did you see any cars as you went up the hill?

A. Saw this new De Soto up half way up the hill. It came over the hill toward us.

Q. You were about half way up the hill when the De Soto came over the hill? A. Yes.

Q. Did you watch the De Soto as it came towards you over the hill and passed? A. Yes.

Q. Going in the opposite direction?

A. It was going west and we east.

(Testimony of Neal Seacrest.)

Q. Did you estimate the speed of that automobile?

A. I would estimate it around normal speed for the road.

Q. That is about 40 to 45 miles?

A. Yes sir.

Q. Then was there any impact between the Interstate truck and the 1955, or new De Soto?

A. Impact?

Q. Yes, did they come together or go by? [137]

A. Went by.

Q. As it went by what, if anything did you do? I might ask you first, where were you seated?

A. On the right-hand side. I didn't do anything.

Q. Did you look any place?

A. Well, I looked, yes.

Q. Where did you look?

A. Well, after the car went by, Mr. Remington was looking in the rear mirror on the truck. I moved over too and I could look. You just have to pull your body over right back of his to look at the mirror too.

Q. Then you could see to the rear?

A. Yes.

Q. Did you look in the mirror on the driver's side or your side?

A. On the driver's side, left side.

Q. What did you see as you looked in the mirror to the rear of the left?

A. We saw the new De Soto when we looked in the mirror, after it had gone by.

(Testimony of Neal Seacrest.)

Q. Go ahead and tell us what you saw, about where you picked it up in the rear view mirror, what you observed and observed the De Soto do?

A. I guess it was about along toward the back of the trailer by the time I leaned over to see it. I saw it by the spot light going on, I wouldn't know when. They were on when I looked. [138]

Q. Tell us about how far you watched the De Soto in the rear mirror.

A. Until it got clear down to the wrecker. The wrecker went into a slide with this other wreck.

Q. How about that red spot light, how long did that stay on? What was the situation?

A. It stayed on all the way down when I saw it and at the wreck.

Q. Now tell us, if you can, which way the head of the car, the front of the De Soto car, was when it started the sliding towards the north or south?

A. It was towards the north, on the right-hand side of the road.

Q. Can you describe the manner of its sliding down the road?

A. Just turned the car over, turned to the right clear around.

Q. Can you give us an estimate about how far it appeared, from your position, to slide down before it struck the wreck?

A. Oh, I would say 100 feet down before it struck the wreck, or a little less.

Q. And then the Interstate Motor Line truck,

(Testimony of Neal Seacrest.)

did it stop or go on some distance, and if so, where did it stop?

A. We went on to the top of the hill, couldn't stop on the hill because of the hill, and found a handy place to park and Mr. Remington and I walked back.

Q. You stopped on the paved or shoulder portion? [139]

A. The shoulder of the road.

Q. Did you go down on the same or cross over?

A. We went down the shoulder along where the wreck was.

Q. As I take it, when you got to the wreck from the west, going east, then the wreck itself, the collision between the De Soto and the wrecker, had not yet occurred, is that right, when you went up to the wrecker?

A. No, not when we went back to the wrecker, no.

Q. Can you tell us the U-Haul trailer, when you saw it, was it on its wheels or tipped over on one side?

A. It was on its wheels at that time.

Q. Where was the front of the wrecker with reference to the highway, some part of the highway?

A. The front of the wrecker was headed to the north, just a little northwest.

Q. We call the highway running generally east and west; in other words, you were going east and to your left would be the north.

A. Yes, it was headed about 45 degree angle off the shoulder of the road.

(Testimony of Neal Seacrest.)

Q. The front end was pointed towards the center or towards the north?

A. The trailer of the car?

Q. No, the wrecker.

A. You said trailer. [140]

Q. I mean the Page wrecker.

A. The front end of the wrecker was over on the center line.

Q. Was it parallel with the road, at an angle or crosswise? Tell us about that.

A. About 45 degree angle toward the north from the center of the road.

Q. In other words, the front would be pointing somewhat towards Wells? A. Yes.

Q. And the back towards Elko, but at an angle?

A. Yes, at an angle.

Q. About how long did you stay around where the accident occurred?

A. I believe it was an hour and a half.

Q. Had the Page wrecker left by the time you walked back there, or still there?

A. No, still there.

Q. Did you see the Page wrecker leave?

A. Yes.

Q. And between the time that you got back—when you arrived back to where the cars were, did you find out one fellow's name was Duff?

A. Yes. Well, I am not sure whether we found out there or later. We found out later or read it in the paper.

Q. Did you see some fellow who appeared to be

(Testimony of Neal Seacrest.)

in the accident? [141] A. Oh yes.

Q. Was it the driver of that De Soto car?

A. Yes.

Q. What was he doing when you arrived at the scene?

A. He was just wandering around, seemed dazed, didn't know what had happened.

Q. Did you hear him make any statement?

A. No.

Q. About what time did you and Earl Remington go back to your truck? How long after this impact?

A. Well, about an hour, just a little over an hour we were there.

Q. When you got in the truck and proceeded on eastward, I guess you went on into Wells?

A. Yes.

Q. Who drove, you or Earl? A. Earl.

Q. What was the condition of the road as you went over the crest?

Mr. Hanson: Objected to as incompetent, irrelevant, and immaterial.

Mr. Wright: I think not.

Mr. Hanson: You mean 14 miles to Wells?

The Court: He may answer as to what it was going over the crest and immediately beyond it.

A. Over the crest of the road it was thawing, no ice on the hill. Apparently it had dried off. [142]

Q. As you went on eastward, that was the condition? A. Yes.

(Testimony of Neal Seacrest.)

Q. I might ask you about this wrecker as you approached it—can you tell us about the color?

A. Light color on top and somewhat of a dark color on the bottom.

Q. And can you tell us the dark color, as to color or appearance of that?

Mr. Hanson: Objected to. It is answered.

A. Dark on the bottom. I wouldn't guarantee what color it was; dark color.

Mr. Wright: That's all.

Cross Examination

Q. (By Mr. Hanson): Mr. Seacrest, how long would you say it was from the time the accident happened until you got headed on your way into Wells?

A. It was some time. We had to make up logs and I remember we made it out for an hour and a half overall time. Probably not actually over an hour and 20 minutes.

Q. In other words, would have been an hour and twenty minutes?

A. That was counting walking back and back again.

Q. During that time it had been thawing, I suppose?

A. Yes.

Q. So this part of the highway just over the crest was wet when you went to Elko, was probably icy at the time of the accident, [143] wasn't it?

A. Very likely.

Q. When this car passed you, you say that you

(Testimony of Neal Seacrest.)

observed the brake lights of the car as it went past your truck?

A. It took me a certain length of time to lean over. Mr. Remington was driving. I knew something might happen, so I leaned over and looked and the lights were on.

Q. Where was the car when you observed those lights, with reference to the rear end of your truck?

A. Back towards the back of the truck, I would say.

Q. Were both of you on an icy stretch of road at that time? A. Yes sir.

Q. You say this car passed you when you were about half way up the hill? A. Yes.

Q. Could you be mistaken about that?

A. Well, I more or less just completely forgot about the accident because I wasn't driving and they hadn't called me for anything, so I forgot it and then I was in Elko one day, they called me out of bed, had an hour's sleep, and said what is this and that and later I rechecked, I came up there the other day and I found out I had taken the wrong distances for the car at the time.

Q. Do you want to change your testimony and say one time you testified the car passed you when on the crest and now you say [144] you change your mind about that?

A. Well, yes, because a certain spot where I remember passing the car was different when actually passing around the hill. We went on up a ways.

Q. On page 144, beginning with line 7, you testi-

(Testimony of Neal Seacrest.)

fied at the hearing in Elko on this matter in April, 1955? A. Yes.

Q. Will you read this with me, page 144, beginning with line 7, and you were asked this question: "All right, let me get that portion so that we will be clear on it. You got to the top of the hill, just as you got to the top of the hill you noticed the other car coming over? A. We were approaching it.

Q. The crest of the hill? A. Yes." Did you so testify under oath at that time?

A. Well, I said I rechecked later and I said I was approaching the hill.

Q. Did you say you reached the crest of the hill about the same time, as I read?

A. As I say, I checked later and didn't reach it at the same time; more or less half way up the hill.

Q. In other words, you want to change your testimony you gave in Elko because what you observed later, you were going over this part of the highway under different conditions?

A. Well, I can see where we passed it on the hill and I rechecked and see where I was wrong.

Q. Wherever you were on the hill, the car passed you and just as it got to the rear end of your car, you saw the brake lights go on?

The Court: He said he had to lean over and saw the lights already on.

Q. I beg your pardon. When you leaned over and looked into the rear view mirror, you saw the brake lights of the car on when it was in the rear of your truck? A. I said approximately.

(Testimony of Neal Seacrest.)

Q. And then you continued to where the accident occurred and you estimated it started to go out of control about 100 feet of the wrecker?

A. That is what I estimated.

Q. You made that estimate when you were looking in the rear view mirror? A. Yes.

Q. Those brake lights being on, did you form an opinion the car was braking all the time going down hill?

A. I presume it was trying to slow down; have to slow down real slow on the ice. The lights were on.

Q. In other words, he was applying his brakes?

A. Yes, the lights were on.

Q. Did they stay on all the time until, say the time of the Page wrecker?

A. As far as I could see, they were. [146]

Q. Now when this car passed you, did Mr. Remington say to you, "That fellow is driving too fast for the road conditions"?

Mr. Wright: I object to that on the ground it is irrelevant and hearsay.

(Question read.)

Mr. Wright: Calling for opinion and conclusion and also hearsay. No showing the defendant was present. Irrelevant.

The Court: Objection sustained.

Q. Now, Mr. Seacrest, you say at the place the wrecker was, that part of the highway, it was icy at that point? A. Very icy.

(Testimony of Neal Seacrest.)

Q. Was there water on top of the ice at that point? A. Water, yes.

Q. You truckers have a term that you use, where there is ice over the hard surface of the highway, where you can see through the ice—you call that black ice? A. Yes.

Q. Would it be fair to describe that area around that wrecker showing a condition of black ice?

A. Well, we call a lot black ice where actually it really isn't black.

Q. What would you call it, sir?

A. Well, we call it black ice, yes.

Q. Was it black ice at that place?

A. It was black up the hill. It was still packed on snow [147] under here.

Q. Black around the wrecker, that part of the highway? A. Not too black.

Q. Was it black at all?

A. Black towards the hill, not around the wrecker.

Q. You had been driving this truck just before you got to Elko? A. I drove it to Elko, yes.

Q. How many hours had you driven it?

A. Well, it took us about seven hours, six hours and 45 minutes.

Q. When you got to Elko it was your turn to sleep in the sleeper you had in the back of the cab there? A. Yes.

Q. And Mr. Remington took over?

A. Yes.

Q. As you approached the scene of this accident,

(Testimony of Neal Seacrest.)

where you say you crossed over on the north side of the highway, you had no difficulty getting past the wrecker? A. No.

Q. Did you make any observations as to where the front of the tow car, wrecker, was with respect to the center line of the highway?

A. It was very close.

Q. As you went past there, apparently everything seemed to be in control, as far as the people were concerned?

A. No, it was awfully slick. [148]

Q. Did you observe the trailer was off the road?

A. Yes.

Q. Do you recall what color it was?

A. I believe it was orange, or sort of orange color.

Q. How about the car, did you make any observation of the color of the car?

A. Dark color, but I wouldn't be sure.

Q. Were you sleepy at the time you went past, after driving seven hours?

A. No, I wasn't.

Q. You didn't pay too much attention to the scene. You could see things were under control and you went on up the hill?

A. We always look to see if we can help. You have a habit of stopping when anything happens.

Q. It was apparent to you at that time your help was not needed, and you proceeded on?

A. That's right.

Q. Can you give us any estimate as to how far

(Testimony of Neal Seacrest.)

you could see, so far as atmospheric conditions were concerned, on that day?

A. I believe you could see as far as you can almost any time. It was fairly cloudy. You could see quite a ways.

Q. The atmosphere was clear? A. Yes.

Q. In other words, you had no difficulty in seeing this car the first time, the terrain permitted you to see it, this car [149] that was off the road?

A. Oh yes, after we got over the rise.

Q. And when you got to the top of the hill, you could see all the way back to where the accident happened?

A. Couldn't see the car but could see something was there. Wouldn't say I could see a car but could see some trouble on the road.

Q. Do you have any estimate as to how far it was from the top of the hill, where you stopped your truck, back to where the accident happened?

A. I estimated it I believe 5/10 of a mile, or about half a mile, but I checked it later from where we were parked and it was 4/10 of a mile.

Redirect Examination

Q. (By Mr. Wright): You say that at the time you estimated it was a half mile. You say then you checked—how did you check it?

A. I drive over there every other day and we have a tachometer attached to the speedometer and anywhere you want to check you look at it and it shows at all times.

(Testimony of Neal Seacrest.)

Q. Looking at that tachometer, does that register the difference between two different places?

A. You would have to look at the mileage and tenths are in a certain place and read it.

Q. By reading it you can tell?

A. Yes. [150]

Q. Is it accurate? A. Yes, you bet.

Q. You say it is accurate? A. Yes sir.

Q. And did you check when you came from the east going west, did you estimate the distance that you could see where something would be on the highway, and as you came over the crest, how far it was where you could see that place?

A. Well, I believe you could see it for half a mile.

Q. Did you check then on the tachometer?

A. Yes, that is how I estimated.

Q. How much was your reading on that?

A. Four-tenths on the tachometer.

Q. Actually by test four-tenths?

A. Four tenths.

Q. I think counsel asked you when you went up the hill, the condition over the crest, whether that was icy. As you went up the hill, could you see over the crest? A. No.

Q. As you went up the hill, up to the point where you parked, what was the condition of the road?

A. It was very slick, still fairly icy.

Mr. Wright: I believe that is all.

(Witness excused.)

Jury admonished and 15-minute recess taken at 2:55 p.m. [151]

3:10 P.M.

Presence of the jury stipulated.

W. L. Bellinger sworn and testified. (Transcript attached at back. See page 350.)

Mr. Wright: If the Court please, we have taken up with counsel and we have stipulated, in connection with evidence of plaintiffs' witnesses, that we are not yet closing, but in order to permit certain witnesses to take the stand, so it wouldn't inconvenience them, that the defendant may call them out of order as their witnesses and without prejudice to any rights in connection with any motions they may desire to make.

Mr. Hanson: Thank you very much. I appreciate it very much and I am sure they do.

ROBERT SHAW

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hanson): Tell us your name, please, sir? A. Robert Shaw.

Q. Where do you live, Mr. Shaw?

A. Provo, Utah.

Q. What is your occupation at the present time?

A. I am a student at Brigham Young University.

Q. Located in Provo? A. Yes.

(Testimony of Robert Shaw.)

Q. What are you studying in school? [152]

A. Well, education..

Q. Are you married? A. Yes.

Q. Do you have any children? A. One.

Q. Directing your attention to December 31, 1954, at a point about 14 miles west of Wells, Nevada, just before about nine o'clock in the morning, or maybe a little earlier, were you driving your automobile? A. Yes.

Q. What kind of an automobile was that?

A. '53 Ford.

Q. Was any one with you at that time?

A. Yes.

Q. Who was?

A. My wife and my son and my brother-in-law.

Q. How old was your child at that time?

A. Eight months.

Q. And your brother-in-law's name?

A. Donald Clark.

Q. Where is he at the present time?

A. Idaho.

Q. What had been the origin of your trip before you got to that point on Highway 40? Where did you come from? A. California. [153]

Q. Had you stayed in Elko that night?

A. No.

Q. You had driven right through from where?

A. Yuba City, California.

Q. And Clark and your wife were in the car and your baby? A. Yes.

Q. Did you have a trailer attached to that car?

(Testimony of Robert Shaw.)

A. Yes.

Q. What, if anything, did you have in that trailer? A. Everything I owned.

Q. You were going away to school at Provo?

A. Yes.

Q. You had an U-Haul trailer? A. Yes.

Q. When you got about 14 miles west of Wells, tell us, in your own words, what happened.

A. Well, the road was icy and going real slow and the wind was blowing quite hard and blew the trailer this way a little. We skidded off the road and ended up facing back the way we came.

Q. Does the highway at that point go approximately east and west? A. I believe so.

Q. You were going approximately east at the time you skidded off the road?

A. I think so. [154]

Q. Did you skid to the north side of the road?

A. Yes.

Q. So your car and trailer would be sort of facing in a northwest direction? A. Yes.

Q. The trailer was still attached to it?

A. Yes.

Q. What was the position of your trailer after your car came to a stop after it skidded off the road?

A. The road was sloped off like this and the car was down like this. The trailer was up on one wheel.

Q. Which side of the trailer was it laying on at that time? A. Right side.

(Testimony of Robert Shaw.)

Q. What did you do after that happened?

A. Well, there was snow on the road and we couldn't get the car out so when a car stopped and offered to call some help, we said all right, and the car was going towards Elko. We didn't know at the time it was farther to Elko than it was to Wells and later a man came along and said we should have sent for help the other way and then he called Wells for the wrecker.

Q. And did Mr. Page come out to the scene in his wrecker? A. Yes.

Q. Do you recall about the time he got there to the scene? A. I think about 9:30.

Q. And then tell us what he did after he arrived, and what you did. [155]

A. Well, we discussed what the best method was to pull the car out of the ditch and proceeded accordingly.

Q. Tell us what he did when you proceeded accordingly.

A. He backed the wrecker up on the side of the road, hooked on to the trailer, and that is about all the further we got.

Q. Had the trailer been righted on its wheels?

A. Yes.

Q. What was the position of the tow truck or wrecker after the trailer had been righted on its wheels, with reference to the highway? What direction was it facing?

A. Well, with reference to the highway, well, the back of the truck was probably pointed in a

(Testimony of Robert Shaw.)

northwest direction, not exactly, but somewhat like on the board there.

Q. Calling your attention to the diagram on the board, this is the first time you have seen this?

A. Yes.

Q. Assuming this is the Ford and this is the trailer and this is the wrecker, how does that check with your idea?

A. That is about like it was; maybe the wrecker was pointed more north than that, the rear end.

Q. You would say that was fairly close to the way the vehicles were just before the impact occurred with the De Soto automobile? A. Yes.

Q. What were you doing when that impact occurred? [156]

A. I was running when the impact occurred.

Q. Just tell us where you were with reference to these cars when you first got the idea you had to start running?

A. Well, we had unhooked the trailer and I was standing directly between the car and the trailer.

Q. That would be about where my pencil is here? A. Yes.

Q. What, if anything, gave you any notice, if you did get notice, of this impending collision of the wrecker and the De Soto?

A. I thought I heard somebody holler and I wasn't sure just exactly what my first idea was.

Q. Were you struck by any part of the vehicle or hit or anything like that?

A. No, I was not.

(Testimony of Robert Shaw.)

Q. Which way did you run, this direction here?

A. Yes.

Q. I pointed toward the west, at a hill generally west away from the vehicle, was that it?

A. Yes.

Q. When this wrecker arrived at the scene, did you make any observation whether or not there were any lights on the wrecker?

A. Before it got there?

Q. No, after it got there.

A. Large blinker lights on it.

Q. Did you see that before the impact occurred between the [157] wrecker and the De Soto automobile? A. Yes.

Q. Tell us what you saw after the impact happened, as to the position of the cars, and also the De Soto automobile which had just arrived?

A. My car and trailer had been pushed down farther in the gully and the wrecker had been straightened in the road, so it was facing the same direction the road was, back was pointed west. The Duff automobile was kind of like this.

Q. Come down here and draw the Duff automobile on the diagram, about where it was. You can make a rectangle similar to the one here.

A. Well, now, the wrecker must have been like this and maybe close to this, and the Duff automobile was here.

Q. The Duff automobile facing what direction? Put a point on it like that. Put a "D" right there for Duff automobile and "P" to represent the

(Testimony of Robert Shaw.)

wrecker after the impact. Would that be about a fair representation? A. Yes.

Q. Now what did you do after this accident happened?

A. Well, I ran to the wrecker. My wife and baby were in the wrecker. I thought probably they had been hurt.

Q. Were they hurt? A. No.

Q. And did you see Mr. Duff at the scene there after you got [158] there where the wrecker was? Did you see him later? A. Yes, I saw him.

Q. Were you present when there was a conversation which took place between Mr. Duff and Mr. Page?

Mr. Wright: Objected to; this is assuming facts not in evidence yet as to any conversation.

Mr. Hanson: I will withdraw that.

Q. Did you hear a conversation between Mr. Duff and Mr. Page?

A. I don't want to say yes or no. I believe they talked.

Mr. Wright: Just a minute—he said he doesn't know.

The Court: He didn't quite say that.

Mr. Wright: Also the objection it is not responsive to the question.

The Court: All right. I will strike it. Go ahead.

A. Well, several people talked to Mr. Duff after the accident and I didn't pay any attention because I didn't think it mattered much and so I wouldn't

(Testimony of Robert Shaw.)

say I heard them have a conversation, but I would say I saw them together talking.

Q. Did you hear anything said by either while they were talking?

A. I never was sure whether I heard Mr. Duff say——

Mr. Wright: Objected to as speculative and it shows he is not sure and I don't think we should keep pressing.

Q. Did you hear the words "80 miles an hour" in that conversation? [159]

Mr. Wright: Objected to as leading and suggestive.

Q. I am asking if he heard any words at all in that conversation.

The Court: Up to this point, this witness has said several people were talking. He heard conversation and was concerned with his wife and baby and didn't pay any attention to the conversation but he made the further statement but he did hear conversation.

Mr. Wright: I make the additional objection not sufficient foundation laid, time, place, and persons present.

The Court: I think it is obvious the foundation has been laid in that regard. That is one thing I see.

Mr. Taber: Your Honor, if he isn't sure that he heard something, whether he heard or didn't hear, then he should not be permitted to testify.

(Testimony of Robert Shaw.)

The Court: I think the objection should be sustained to the question as you asked it.

Mr. Hanson: Perhaps I can clarify it this way, your Honor:

Q. Did you see Mr. Duff and Mr. Page together talking at any time while you were there?

A. Yes, I believe I did.

The Court: Now let me just point out to you, [160] Mr. Shaw, many times we have a habit of saying "I think" and "I believe", which makes it speculative, when we don't mean that at all. Now did you hear or didn't you?

Mr. Wright: I object to the question, calling for opinion and conclusion of the witness, as to whether or not they were talking.

The Court: Objection overruled. You may answer.

A. Yes.

Q. And did you hear any words of the conversation said between them, any words at all? If you did, tell us what those words were. A. No.

Mr. Taber: Your Honor, the witness made a statement a few minutes ago which I think the jury should be admonished to disregard.

The Court: Yes. Ladies and gentlemen of the jury, you may recall that a moment or two ago the figure 80 miles an hour, the expression, came in the discussion. You are admonished that you are to consider that as no part of the evidence and treat it as if it were never said.

Q. Mr. Shaw, you said that your trailer and the car were knocked further into the gulley. Can

(Testimony of Robert Shaw.)

you describe the damage to the trailer and your car, as you estimate it? [161]

A. The trailer ran into the back of the car and bent the bumper and broke the tail light and sort of shoved the back right around.

Q. Did you make any observation of the damage to the Duff automobile after it came to rest there, came to a stop? A. I did.

Q. Describe generally what the appearance of the damages was then.

A. The whole left side was badly pushed in.

Q. Did you see any damage to the steering wheel of the automobile? A. Yes.

Q. Describe the damage to that steering wheel, if you will please.

A. It looked like it bent the circle part of the steering wheel back.

Q. Will you say about how much it bent the steering wheel out of line?

A. It didn't look like he could have steered the car.

Q. Now, Mr. Shaw, I show you Exhibit No. 3, and I will ask you if you recognize that photograph as being Mr. Duff's automobile?

A. It looks like it might have been Mr. Duff's De Soto. I couldn't tell.

Q. What color was your automobile?

A. Green.

Q. Well, was it dark green or light green?

A. Light green. [162]

Q. What color was the trailer?

A. Orange.

(Testimony of Robert Shaw.)

Q. Did you make any inspection of the inside of the Duff car as to mileage on the speedometer?

A. Yes, I did look at the speedometer. It had four hundred and some miles on it.

Q. Do you recall the exact amount?

A. No.

Q. Can you tell us anything about damage to the Page wrecker?

A. Well, I don't know how to describe it. It looked like it put the wheels out of line, bent the fender. I don't know what the exact—

Q. Any damage to the boom of the Page wrecker? A. I don't recall exactly.

Mr. Hanson: I think that is all.

Cross Examination

Q. (By Mr. Wright): Now, Mr. Shaw, I take it that you were going from Elko eastward to Wells, Nevada? A. Yes.

Q. You were at least going to go through Wells, were you not? A. Yes.

Q. And the condition of the road generally from Elko up to where you started the skidding was what? A. Real icy. [163]

Q. How about the appearance of the highway as you drove along? Did it appear to be a snowy icy condition? A. No snow, ice.

Q. I mean, snow that had become ice? It wasn't ice that apparently came from the sky. It was snow and then turned into ice, something of that nature?

A. Yes.

Q. You say you were going slow? A. Yes.

(Testimony of Robert Shaw.)

Q. And I guess icy, the ice and snow you were driving on? A. Yes.

Q. And you say it was slippery? A. Yes.

Q. Was it very slippery?

A. Very slippery.

Q. And you were going up a grade, were you not? A. Yes.

Q. Where you went off, it was not at the foot, but partly up the grade? A. Yes.

Q. And you were on your right-hand side of the road going towards Wells? A. Yes.

Q. And then it started skidding going up hill?

A. The grade is very slight. [164]

Q. But you say you did skid from your right-hand side? Were you on the right-hand side of the center line when you started to skid? A. Yes.

Q. How fast were you going? A. Thirty.

Q. Had you been going any more than thirty? You think that is about it?

A. Yes, pretty close.

Q. You skidded, and you were on your own side in the right-hand lane and the front end of your car then skidded in which direction, to your left or right? A. To the left.

Q. Then it did go clear across the highway and off the north shoulder, your car?

A. Well, it skidded like this, sideways, right across the road, and turned right around.

Q. Would it be fair to say that you were going toward Wells on the right-hand side of the center, is that correct? A. Yes.

(Testimony of Robert Shaw.)

Q. Then as you came this way, you started skidding here—suppose you come down and take this little toy vehicle for illustration purposes and this merely shows you were going along in this way. Where did you end up? Describe as you go along, so it will be in the record. [165]

A. Well, maybe something like this.

Q. We are trying to describe with reference to the right-hand side, turning around, etc.; in other words, give a graphic picture with descriptive words, so it will go in the record and the jury can hear and talk in a loud voice.

The Court: Suppose you use the eraser to represent his car.

Q. Now, Mr. Shaw, use this for illustrative purposes and describe as you go along and take your time, so the court reporter can hear. Now you were going eastward from Elko, Nevada, on the right side of the highway and right of the center line. Your trailer is attached.

A. The car is pointed this way.

Q. To the east?

A. To the east. The trailer begins to swing and pull the car back of the car wheels to the right. Then the front of the car turns north like this, with the trailer swing around like this and pulled the trailer on the north side of the road, facing west again.

Q. The trailer sort of caught up with the car and went ahead of it to the east of the car and the front end pointed back towards Elko?

(Testimony of Robert Shaw.)

A. Right.

Q. And then it did skid more or less alongside-ways the *wrecker*? A. Yes. [166]

Q. And it ended up so the Ford and trailer were pointing this direction you have indicated on the board? A. Yes, that's right.

Q. Now, Mr. Shaw, did you apply your brakes when it started to skid?

A. No, I knew it wouldn't do any good.

Q. You say it was so slick it wouldn't do any good to apply your brakes? A. Yes.

Q. After you got out, did you further test the slipperiness by you and Mr. Clark doing a little sliding about here? A. We ran, yes.

Q. Where was that, above where the wrecker stopped? A. Right under.

Q. Did you fall over or go skidding down the road on the ice? A. Well, we just skidded.

Q. Quite slippery then, I take it? A. Yes.

Q. Now with reference to this time as you saw the wrecker come down the hill, the wrecker was on its right side on the road, all wheels, I take it?

A. Yes.

Q. And did it come down more or less on the shouder or stay on the highway as it came to where you were? Did it pull over on the shoulder and stop? [167]

A. I don't remember.

Q. You spoke of the dome light. Do you remember when the dome light went on? A. Yes.

Q. When was that?

(Testimony of Robert Shaw.)

A. As they were getting ready to put the wrecker in position, my brother-in-law said that they should turn on the dome light. He thought of that so he hollered and they turned it on.

Q. So your brother-in-law, Mr. Clark, told these wreckers to turn on their dome light?

A. Yes.

Q. Now did you see anybody with any flares or flagmen or flags or signs from the wrecker up towards the crest of the hill?

A. No.

Q. How was the hill from where the wrecker finally put itself on the highway, up towards the crest, as far as you could see, with reference to the covering of the road?

A. It was slick.

Q. And that was true up to the time this collision occurred?

A. Yes.

Q. After the impact, of course, the Page wrecker went to Wells, did it not?

A. Yes.

Q. And your wife rode with them and your son?

A. Yes. [168-169]

Q. And of course that was to get out of the cold and discomfort. Then did you notice, when you went over and saw your wife, you said she was not injured?

A. Yes.

Q. And you were concerned about your wife. How about the windshield, was it broken at all?

A. Never looked.

Q. Now you went to Wells that day, didn't you?

A. Yes.

Q. And after the ambulance came and took the injured people to Elko, your little trailer was

(Testimony of Robert Shaw.)

pulled up on to the highway by another wrecker, was it not? A. Yes.

Q. That is your Ford was towed up on the highway by some other wrecker, was it not?

A. Yes.

Q. How did your car get to Wells, Nevada?

A. I drove it.

Q. That means your car was not wrecked?

A. No.

Q. Except for the break where the tongue had been disconnected, pushed into it. When you got on top of the crest of the hill to the east, going towards Wells west over the crest—about what time was it that you drove your car to Wells, Nevada? A. About noon. [170]

Q. Pretty close about the time the wrecker that had the De Soto went into Wells, or did you leave before? A. I think he was after me.

Q. What did you see when you got on top of the hill, with reference to any water, ice, or what was the condition of the road?

A. The condition of the road was it was dry.

Q. How far east towards Wells?

A. I think there was just one slick spot that I remember.

Q. About where was that, if you remember, about how far over the crest?

A. I don't remember. It was along the way somewhere.

Q. Otherwise the road was good? A. Yes.

Mr. Wright: Thank you, that is all.

(Witness excused.)

MRS. LORETTA SHAW

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hanson): Will you state your name please? A. Loretta Shaw.

Q. You are the wife of the gentleman who just testified? A. Yes.

Q. And his first name is Robert? A. Yes.

Q. Directing your attention to December 31, 1954, do you [171] remember an accident that happened about 14 miles west of Wells, Nevada on Highway 40? A. Yes.

Q. Directing your attention to that morning and around nine o'clock, was the car that you were riding in involved in an accident? A. Yes.

Q. Who was in the car at the time?

A. My husband and my brother and my little son and myself.

Q. What happened to your car that caused it to get in an accident, the car you were riding in?

A. Well, we were pulling a trailer and the wind started swinging the trailer around and swung the car over across on the other side of the road.

Q. Was the highway approximately east and west at that point, as you remember it?

A. Yes.

Q. And which side of the road did your car need to be on, your left or right, as you were going east? A. Left.

Q. What happened when your car came to a

(Testimony of Mrs. Loretta Shaw.)

stop on the north side of the highway, and the trailer?

A. Well, my husband and my brother got out and looked the situation over and saw they couldn't get back on the road, so the first car that stopped said they would call the wrecker. [172]

Q. Do you remember Mr. Page's wrecker coming to the scene from Wells? A. Yes.

Q. What did you do after that Page wrecker came to the scene?

A. I took the baby and got in the cab of the wrecker.

Q. At that time where was the wrecker on the highway? A. When I got into it?

Q. Yes.

A. Well, it was just facing the direction we came from and they hadn't got into position to get the trailer out.

Q. Did you get in the seat in the wrecker after it got in position to get the trailer out?

A. Yes.

Q. Which way was it facing then, do you remember?

A. Well, it was facing southeast, I guess it was; it was towards Wells, but it was across the road.

Q. Was it on the north half of the highway?

A. Yes.

Q. While you were in that cab of that wrecker, state whether or not there were any other cars passed the wrecker at that point?

A. Yes, there were.

(Testimony of Mrs. Loretta Shaw.)

Q. Did you have any trouble or difficulty in going around the wrecker? A. No. [173]

Q. How far could you see towards Wells as you sat in that wrecker?

A. About the top, to the rise.

Q. Could you see the car, which you later learned was the Duff car, come over that rise and approach the wrecker, when you were sitting in it?

A. Yes.

Q. As you saw that car come over the rise, did you make any observation as to its speed as compared with other cars you had seen coming in that direction?

Mr. Wright: Incompetent, irrelevant and immaterial as to any comparison with other automobiles, and also not sufficient foundation laid as to whether or not this witness made any estimate or she knows whether or not she could.

The Court: Well, it might be objectionable as to comparative speed. Reframe the question.

Q. Can you tell us whether the car was coming fast or slow as it approached the point you were?

Mr. Wright: Objected to as leading and suggestive and whether or not she could estimate speed or did estimate.

The Court: Objection overruled.

Q. Will you tell us whether or not the car was coming fast or slow at the time you saw it?

A. It seems it was coming very fast.

Q. Did you observe whether or not the speed of the car you saw [174] coming over the rise

(Testimony of Mrs. Loretta Shaw.)

changed any from the time you first saw it until the impact occurred?

A. Well, it didn't change any that I saw until it started to skid.

Q. By that you mean it didn't decrease the speed until it started to skid, is that your testimony? A. That's right.

Q. Could you give us any estimate as to how far it was from the wrecker when it started to skid?

A. It was so close that I was afraid it wouldn't be able to turn out around and get by without skidding off the opposite side of the road.

Q. What part of the car, do you know, struck what part of the tow car you were sitting in, or the wrecker?

A. Well, the front of it struck it, probably the one fender. It was at sort of an angle.

Q. By "it" you are referring to the Duff car when it struck the wrecker? A. Yes.

Q. And the impact was on an angle when it hit the wrecker, or can you tell us?

A. Well, it seemed to be slightly at an angle, because it started to skid off to the north side of the road, but it wasn't much of an angle.

Q. What happened to the wrecker as a result of the impact with [175] the Duff car?

A. The wrecker was straightened around in the road, still on the same side, facing east.

Q. And what happened to the car where it did come to a stop? A. The Duff car?

(Testimony of Mrs. Loretta Shaw.)

Q. Yes, the Duff car.

A. I don't remember.

Q. Did you make any observation of it after it hit the wrecker?

A. Yes, it struck the wrecker and hit the back end of the trailer.

Q. Did it stop at that point, or do you know?

A. I don't know.

Q. Were you excited about that time?

A. I certainly was.

Q. Were you hurt in the accident? A. No.

Q. The baby wasn't hurt either? A. No.

Cross Examination

Q. (By Mr. Wright): At the time of the accident, was anybody else in the front seat with you and your baby? A. No.

Q. How about the windshield after?

A. I don't remember.

Q. Before the accident had you driven the car very much? [176] A. Yes.

Q. And did you form any estimation of the speed of the car in miles per hour? A. No.

Q. Now the car was coming toward you, coming down hill, was it not? A. That's right.

Q. And it would be more difficult to determine whether the car was checking its speed since it was coming at a person, wouldn't that be somewhat of a difficult procedure?

A. Well, I think it is rather a difficult question.

Q. In other words, what I am getting at, if you

(Testimony of Mrs. Loretta Shaw.)

see a car from the side, you can tell whether it is slowing down much more easily than whether a car is coming toward you, is that not true? Do you know?

A. No, don't you think you can tell whether a car is coming slower than before, even if you don't see it coming toward you?

Q. Well, I was just asking you. I don't happen to be put on the spot.

The Court: Well, of course, we always joke about the ladies taking charge, and this is pretty good evidence. You are doing all right. Just keep right on.

Q. You were sitting in the cab of the wrecker and the impact occurred and of course you saw the back end of the wrecker move. [177] Will you just tell us to what extent you observed or felt or knew that the wrecker moved, the front end, side, back, etc., and what was its position with reference to where it was before? Do you understand the question?

A. I believe so.

Q. Yes?

A. Well, I saw where the car hit and it was toward the back of the wrecker and I saw where the wrecker was after the impact had occurred, after the accident had occurred, and as far as I remember, that is what I judge by, because naturally when something hits you, your thoughts get somewhat confused.

Q. The back end then sort of swinging around?

A. Well, yes, it was.

(Testimony of Mrs. Loretta Shaw.)

Q. And straightened out so it was more or less parallel with the road afterwards? A. Yes.

Q. How about the front end? Did it seem to stay about where it was, or move?

A. It seemed to move a little bit up, not forward.

Q. How much would you say by a little up, not forward? Give some description.

Q. It was still on the north side of the road, not across the line, so probably a foot or two, possibly three.

Mr. Wright: That's all.

(Witness excused.) [178]

MELVIN MILLS

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hanson): Will you state your name please? A. Melvin Mills.

Q. Where do you live?

A. Wells, Nevada.

Q. What is your occupation?

A. Construction worker.

Q. How long have you lived in Wells?

A. A year ago last March.

Q. Do you know Mr. Page? A. Yes sir.

Q. Directing your attention to December 31, 1954, around nine o'clock in the morning, or maybe a little bit before that time, what were you doing on that day?

(Testimony of Melvin Mills.)

A. On that day I had to report to the doctor at Elko.

Q. How did you go to Elko.

A. By car.

Q. Your own automobile? A. Yes sir.

Q. Was anyone else with you? A. Yes sir.

Q. Who was with you? A. My boy. [179]

Q. How old is he? A. Seventeen.

Q. When you reached a point about 14 miles west of Wells, did you see anything that was on the highway? A. Yes sir.

Q. Tell the jury and the Court what you saw.

A. Coming down the highway, I could see a truck, first the top of the truck on the crest of the hill.

Q. What kind?

A. Transport—I couldn't say—Interstate.

Q. Did you see anything else?

A. Yes sir, a little farther I could see a red light blinking on and off.

Q. What was that red light on?

A. On the wrecker.

Q. Did you later determine whose wrecker that was? A. Yes sir.

Q. Whose was it? A. Mr. Page's.

Q. Where was that wrecker when you got down where it was?

A. Sitting right close to the shoulder of the road, about as far as he could take off. I would say about 45 degrees.

Q. Did you see anything else at that time?

(Testimony of Melvin Mills.)

A. Something behind it, but what it was I couldn't say.

Q. Did you see another car to the north of the highway? [180]

A. There was a car there but I didn't see it.

Q. Did you stop there? A. No sir.

Q. What were the atmospheric conditions as to visibility at that spot as you came over the crest of that hill? How far could you see?

A. I would say about a mile.

Q. What about road conditions at that spot, as you come over the crest of the hill down to where this wrecker was? A. Slick ice.

Q. How about road conditions between Wells and the crest of the hill?

A. It was spotty, I would say slick, good spots there.

Mr. Hanson: Your witness.

Cross Examination

Q. (By Mr. Wright): When you came down the hill, did you see somebody out there flagging?

A. No sir.

Q. Wasn't anybody flagging at all?

A. Not that I noticed.

Q. Did you see Mr. Page or anybody around the wrecker? A. Yes sir.

Q. When you came down from the top, was there anybody coming up? A. No sir.

Q. So you had an unobstructed view clear down to where the [181] wrecker was setting on the road?

(Testimony of Melvin Mills.)

A. That is right.

Q. You didn't have to worry about a car or truck coming up the hill, did you? A. No sir.

Q. And your boy was driving? A. Yes sir.

Q. And, of course, you are familiar with that section, aren't you? A. Yes sir.

Q. You know about that hill? A. Yes sir.

Q. You seen some slick spots?

A. The road, like I said, was slick in spots.

Q. That was up the crest of the hill, so you don't know what the boy was thinking about as he came to the crest and over the other side?

Mr. Hanson: Objected to——

The Court: I don't think this witness is qualified to testify.

Q. About what time of day was it that you passed this wrecker?

A. I would say somewhere in the neighborhood of nine o'clock.

Q. About nine a.m., and that wrecker was then at that time on the west bound part of the highway? A. Yes.

Mr. Wright: That's all. [182]

Jury admonished and recess taken at 4:45 p.m. until Monday, November 14th.

Monday, November 14, 1955

Presence of the jury stipulated.

The Court: As I recall, with the consent of the plaintiff, and for the convenience of witnesses, the defendant had put on three witnesses out of order. Is that correct?

Mr. Pike: That is correct.

The Court: And the plaintiff?

Mr. Wright: We are ready, if the Court please. I would like to call Mrs. Jennie R. Duff back for a couple of questions.

JENNIE R. DUFF

having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Wright): Mrs. Duff, I am not sure whether I asked you whether or not you had been in a previous accident or had been previously injured? A. No sir, I have not.

Q. And the chest, the sternum, had you ever had that fractured? A. No sir.

Q. Had you ever had it caved in?

A. No sir.

Q. And before the accident occurred, was there any depression [183] of the sternum, the middle part of the chest? A. No sir.

Mr. Wright: That's all the questions I have.

Mr. Pike: No questions.

(Witness excused.)

ELIZABETH BRONSON

one of the plaintiffs, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wright): Your name is Elizabeth Bronson? A. That's right.

Q. You are one of the plaintiffs in this action?

(Testimony of Elizabeth Bronson.)

A. Yes sir.

Q. Where do you live, Mrs. Bronson, plus any specific address?

A. 533 Grant Street, Vallejo, California.

Q. And that is in California?

A. Yes, in California.

Q. And have you lived around in that area more or less for a considerable number of years?

A. I have lived in California two years last August 1st, but I lived in Benecia nine months up until last March but I went back to Vallejo.

Q. I mean more or less in that same area?

A. That's right.

Q. You are the sister of Jennie R. Duff, one of the other plaintiffs, are you not? [184]

A. That's right.

Q. Is she older than you are?

A. She is older.

Q. What is your age, please?

A. Fifty-eight.

Q. Are you married? A. Yes.

Q. You have been married?

A. I have been married.

Q. Calling your attention to the 31st day of December of 1954, were you up in Idaho?

A. I was.

Q. And in connection with some other matter, I take it, and found yourself on December 31, 1954 in Burley, Idaho? A. Yes, I did.

Q. How did you go to Idaho?

A. Went up by bus.

(Testimony of Elizabeth Bronson.)

Q. And did you have an original plan about coming back?

A. I was coming back on the bus.

Q. And then was there a change in your plan?

A. Mr. Duff, who is my brother-in-law, and my sister was taking, Jennie Duff, was taking their vacation and said if I would wait two days until he finished with his business, he would take his car and I just as well go back with them.

Q. Then did you agree to pay any of the gasoline—you were [185] just riding with them?

A. I was just riding with them.

Q. It wasn't in connection, then, with any business of yours or business of Mr. Duffs that you were going to go with them? A. No.

Q. Merely the fact if you stayed over a couple of days, you could ride with them?

A. That's right.

Q. Then on December 31, 1954, did you start out with Mr. and Mrs. John Duff?

A. I did.

Q. Tell us about what time you left Burley, Idaho?

A. About ten minutes to six a.m.

Q. That would be mountain time?

A. That is right.

Q. Is that one hour ahead of standard time?

A. Yes, one hour ahead.

Q. Then just briefly now, your general course was up to Wells—don't go into details, but just general course up to Wells, Nevada.

(Testimony of Elizabeth Bronson.)

A. You mean what we did?

Q. No, where did you go, the general outline?

A. Well, from Burley to Mertil, from there to Twin Falls and then on to Wells, Nevada.

Q. That main road going down to Wells, Nevada? [186]

A. That is right.

Q. During that time was there any snow condition covering the highway that you encountered?

A. There was snow at times, quite a little bit, before we reached Wells, patches of snow.

Q. Where did that snow condition first—where did you encounter that?

A. Somewhere around Rogeston.

Q. As to the roads from Rogeston, Idaho, through Contact and into Wells, what generally were the condition of the covering of the highway?

A. Well, there were patches of ice and snow, but it wasn't too slick.

Q. And was there anything unusual that happened while going from Rogeston to Wells on that trip that morning?

A. My sister said she was sleepy and she climbed over the front seat and she laid down on the seat and covered up with a blanket.

Q. What I had in mind, was there anything unusual with reference to the operation of the car by Mr. John Duff?

A. No.

Mr. Hanson: Objected to——

The Court: Objection sustained. The answer will be stricken.

(Testimony of Elizabeth Bronson.)

Q. When you got to Wells, Nevada, who was driving? A. Mr. Duff. [187]

Q. You were seated where?

A. On the opposite side.

Q. On your right-hand side?

A. On my right-hand side.

Q. And Mrs. Duff?

A. She was back lying down, in the back of the car.

Q. Did you stop at Wells, Nevada, or go through?

A. Went on through, we didn't stop.

Q. Then as you went westward from Wells, Nevada, were you on highway U. S. 40?

A. That's right.

Q. After you left Wells, Nevada, tell us the condition of the road as you proceeded westward on U. S. 40.

A. There were patches of snow and some ice, but not too bad.

Q. And outside of the patches, what was the condition of the road surface?

A. It was dry. Probably a little water, but it wasn't dangerous.

Q. What can you tell us about the speed, of miles per hour, Mr. Duff was travelling from Wells, Nevada?

A. To my recollection, and I did look at the speedometer before, he didn't go faster than 45 miles.

Q. You say that you looked at the speedometer

(Testimony of Elizabeth Bronson.)

at times? A. I did.

Q. Do you remember about what was the last time you looked at the speedometer? [188]

A. Before we reached the crest of the hill.

Q. And what did the speedometer show at that time on the Duff car?

A. Showed forty-five.

Q. Up to the crest of the hill—and by that do you mean the crest of the hill that is immediately east of where the accident later occurred, would be the first hill? A. Yes sir.

Q. So in speaking of the crest, you will refer to that then as the particular hill, will you?

A. That is right.

Q. Where, with reference to that crest of the hill, was it that you last looked at the speedometer?

A. Yes, it was before we reached the crest.

Q. What was the speed of the Duff car from there, where you looked at the speedometer, up to the time of reaching the crest?

A. You mean on our way, before we reached there?

Q. Yes.

A. Well, it hadn't increased any more than forty-five. I never seen Mr. Duff's car exceed 45.

Q. I was trying to get comparison. You read it 45 miles then before you reached the crest?

A. That is right.

Q. What was the comparison of the speed of the car from where [189] you looked to the time you reached the crest? A. About the same.

(Testimony of Elizabeth Bronson.)

Q. What did you see about the roadway itself before you arrived at the crest of the hill? Did you notice that? A. It was dry.

Q. Now tell us, before you arrived at the crest, describe the highway, as to whether it was a steep grade, a gradual grade or more flatter. In other words, give us a picture of the topography of the road as to grade, or whatever it was, please.

A. Well, the grade wasn't very steep. It was just a gradual climb.

Q. And then as you came to the crest, in going over the crest of the hill, what, if anything, did you notice when you got on the other side going downward—the road does go downward, does it when you are going west? A. Yes.

Q. Tell us what you noticed and what you saw when you got over the crest of the hill and going down the hill to the west, please.

A. It was dry. The first thing I noticed was a big truck coming toward us.

Q. And where was the Duff car when you first noticed this big truck coming toward you?

A. We had gotten over to the top of the crest. The truck was on the opposite side of the street coming toward us. [190]

Q. You mean the highway?

A. Yes, the highway.

Q. Where was the truck when you first saw the truck?

A. I imagine it was—it wasn't to the bottom of the hill quite. I just don't know.

(Testimony of Elizabeth Bronson.)

Q. Then did the two vehicles pass each other, in the sense of meeting each other and going by each other? A. They did.

Q. And about where did that procedure take place with reference to the bottom of the hill, middle or top of the hill, or any place along the line, if you could fix it for us?

A. I would judge that we would be about one-third the way down and they two-thirds up, to my recollection.

Q. And was there any impact or striking between the two vehicles? A. No.

Q. Before the two vehicles passed each other, did anything on the truck attract your attention, or the truck do anything to attract your attention?

A. Yes.

Q. What was that?

A. Blinked its lights at least twice.

Q. And at that time did you know what that meant?

A. I did not. I thought it was a friendly gesture.

Q. Tell us whether or not you understood the blinking of the [191] lights, or did that give you any idea of any danger to be encountered, or anything of that nature?

Mr. Hanson: Objected to as repetitious. She has told us what she thought about it.

The Court: Objection sustained.

Q. After the two vehicles went by each other, I take it Mr. Duff kept on going down hill?

(Testimony of Elizabeth Bronson.)

A. That's right.

Q. On which side of the road was he going as he went by the truck and on down?

A. On the right side.

Q. What, if anything, did you see after going by this big truck?

A. I noticed a yellow or an orange trailer up off to the right side of the road and ahead of that a dark car, I can't tell you what color, but it was dark.

Q. Were those objects on the roadway itself or off the road?

A. They were off to the side of the road.

Q. Did you see any other vehicles?

A. Not at that time I didn't.

Q. And then what was Mr. Duff, as to his speed, compared with the speed when you went over the crest, please?

A. To my knowledge, Mr. Duff was slowing down.

Q. And as you went down the hill there, did you pay any attention to the highway covering, and if so, what did you notice as to that? [192]

A. I didn't observe anything about the highway because my attention was drawn to the truck at first and then to the objects at the side of the road later.

Q. Then as the Duff car went down, did you notice anything further as it approached the orange and the parked object off to the side of the road? Did you notice anything further?

(Testimony of Elizabeth Bronson.)

A. I noticed nothing until we started to skid.

Q. When you started to skid, what did you notice?

A. I noticed there was a wreck ahead. It was right directly in front of the right lane, right in front of us.

Q. Tell us about how far the Duff car was away from the wrecker when you first noticed it.

Q. I would judge between 100 and 150 feet. I am not too good at judging, but just my judgment.

Q. Did you see the wrecker before the Duff car started sliding or after? A. After.

Q. When the Duff car started sliding, which way was it pointed? Describe the manner of sliding.

A. It was sliding sideways, facing the north, the Duff car was facing the north.

Q. When it slid, which direction did it slide, the Duff car?

A. It slid somewhat down the road. It would be sliding west and it was facing north.

Q. In other words, do I get the picture, it slid more sideways? A. That's right. [193]

Q. And with reference to the road, was it sliding directly down the road, or at an angle, or what?

A. It was sliding a little bit with the front headed—well, a little on an angle, but sliding sideways.

Q. And in general which way were you sliding? In other words, were you sliding west and a little

(Testimony of Elizabeth Bronson.)

bit to the north there, or more or less west, or what?

A. More or less west.

Q. Then what, if anything, did you notice about the wrecker, as to the position it occupied on the highway?

A. The wrecker was setting directly straight, north and south, to my knowledge.

Q. What part of the highway did it occupy?

A. It occupied the north lane, or the right-hand side lane.

Q. What we call for west-bound traffic?

A. That's right.

Q. Tell us what you noticed as to any lights on the wrecker, if any?

A. I saw no lights, saw no blinking light at all.

Q. Then was there a collision?

A. There was.

Q. What part of the Duff car collided with what part of the wrecker, as far as you can tell us?

A. As far as I can remember, the Duff car about the front and the middle of the Duff car hit the, well, the back part of the wrecker. [194]

Q. That would be the left-hand side of the wrecker? A. That's right.

Q. On the left part, not on the right part?

A. That's right.

Q. And I take it, then, the front end of the wrecker, was that headed toward the south or toward the north? A. That was headed south.

Q. Then from the point of impact with the wrecker, what facts do you know?

(Testimony of Elizabeth Bronson.)

A. I knew I hit the front of the car with my head more or less, the top of the windshield.

Q. Do you recall about the car after the impact with the wrecker, how far it went or where it stopped? Can you tell us about that?

A. It didn't go very far. It stopped right away.

Q. What do you recall after the impact about it? Tell us that please. In other words, did you see it come to a stop, or you know it stopped, or what?

A. Yes, I know it stopped.

Q. What do you recall after the impact, the first thing you recall?

A. I recall I was lying down in the front seat, with my head toward the south, and Mr. Duff was lying across me with his head sort of in my lap. Is that what you mean? [195]

Q. Yes, that is what I mean. Then were you taken out of the Duff automobile?

A. I was.

Q. And put in the Ford?

A. That's right.

Q. And then the ambulance came and took you to the Elko General Hospital?

A. That's right.

Q. When you got to the Elko General Hospital, I take it then that you got a chance to sort of ascertain, know, what had happened to you?

A. That's right.

Q. Now when you started to ascertain what had happened to you at the Elko General Hospital, tell us what you found had occurred. What parts of your body seemed to be involved, please.

A. My head hurt. It hurt until it seemed almost

(Testimony of Elizabeth Bronson.)

more than I could stand. They kept me under anesthetics.

Q. You mean narcotics?

A. Narcotics, anything you might call it, but it is drugs.

Q. What part of your head was involved? In other words, I want you to describe it please.

A. My head was hit here.

Q. What side please?

A. On my right side and it was swollen from the top of my head to the bottom of my chin. [196]

Q. On your right side?

A. Right side, and I was bruised and black to my waist on the right side.

Q. On the right side? A. That's right.

Q. Then did you notice any headaches or pain, anything of that nature?

A. It was nothing but headaches and pains.

Q. How about your upper chest, did the chest bother you at all?

A. My chest pained terrible.

Q. In what area?

A. Well, all through my chest.

Q. Then you stayed in the hospital about how long?

A. We were in the hospital from the last day of December until the 22nd day of January.

Q. How about your left shoulder? Did you notice anything else beside what you already described?

A. To my knowledge my left shoulder was broken and thrown completely out of the socket.

(Testimony of Elizabeth Bronson.)

Q. Anything about your neck and back?

A. My neck hurt terribly.

Q. What part of your neck seemed to hurt when you were in the hospital?

A. All from the back, back end and up into my head.

Q. And during your stay in the hospital, did the doctor perform [197] any surgery on you?

A. Dr. Trehune set my arm, my shoulder.

Q. Your left shoulder?

A. Left shoulder, and he also put a harness around my body, because I had several ribs broken.

Q. Any face condition?

A. My face was just all swollen and in the hospital they made light of it, but I had a great bruise across my face.

Q. Was there a draining out of any fluid, blood or anything like that?

A. The last week I was in the hospital Dr. Hood drained that with a needle, as if you were taking a blood test from your arm, and he drew quite a lot of black blood out of the side of my cheek three different times.

Q. That was on the right cheek?

A. That was on the right cheek.

Q. From that have you got any markings on the right cheek? A. I do have.

Q. Could you point them out to the jury and then I will describe them.

A. Right here.

Q. You are describing on the right cheek ap-

(Testimony of Elizabeth Bronson.)

proximately the mouth line and on the right cheek?

A. That's right.

Q. Now you left the hospital on, I think you said, January 22nd? [198] A. Yes.

Q. Tell us, were you fully recovered from the injuries or if you still had some pains? Tell us about that date, which might probably fix it in your mind as a special date?

A. I had not fully recovered, but the doctor said that I could leave if I had some one to accompany me on the train from Elko to my home town.

Q. Then did you make arrangements for some one to go with you? A. Yes sir.

Q. Who was that?

A. My sister from Vallejo, California.

Q. What was her name?

A. Elfreda Nielson.

Q. Did she then make a trip up from California to come up and go back with you? A. She did.

Q. What pains or discomfort did you notice the day you left the hospital and tell us if you had any apparatus on and what you had on.

A. I still had this harness around my ribs to hold my ribs in shape. I was still wearing that and my arm was still in a sling. They had removed the adhesive that held it up, so I had to have my arm in the sling.

Q. That is your left arm?

A. Left arm. [199]

Q. Did you notice any more pains?

A. My arm and shoulder pained all the time.

(Testimony of Elizabeth Bronson.)

Q. With reference to your chest, had that cleared up?

A. It had cleared up some, but I still had pains in my chest.

Q. And your neck?

A. And my neck was bad yet.

Q. And describe that more fully. When did it pain you?

A. It pained me all the time at that time?

Q. What part?

A. Mostly from my shoulder, from my left shoulder up clear to the top of my head.

Q. And then you went by train, did you?

A. I went by train.

Q. How did you get from the hospital down to the train in Elko, Nevada?

A. State that again.

Q. What means of conveyance—how did you get from the hospital to the train in Elko?

A. I went by taxi.

Q. How much was that charge?

A. That was only fifty cents.

Q. Then on the train, you went by train to Berkeley, California? A. That's right.

Q. Did Mrs. Nielson go with you?

A. She did. [200]

Q. Then when you got to Berkeley, that is a little distance from Benecia? A. That's right.

Q. How did you get from Berkeley to Benecia?

A. My neighbor had a new car and he and my daughter came to Berkeley and took me home.

(Testimony of Elizabeth Bronson.)

Q. You had made arrangements for them to meet you? A. That is right.

Q. How far is it from Berkeley to Benecia?

The Court: Mr. Wright, it seems to me that you are near to the end of this. Are you going to finish today?

Mr. Wright: Well, all right. I am sorry, if the Court please.

Q. Was there any charge that you paid, or has there been any charge incurred in connection with the trip from Berkeley to Benecia?

A. I gave Mr. Madsen five dollars.

Q. After you got in Benecia at your home, did you see any doctors?

A. I didn't for a short time. I was too sick to leave.

Q. Did anybody take care of you for a few days or so?

A. The day I reached home was Sunday and my daughter works at Mare Island for the government and she stayed home with me on Monday and Tuesday after my return home. [201]

Q. And the purpose of her staying home was to take care of you? A. That's right.

Q. What wages does she ordinarily get?

A. Ten dollars a day.

Q. And she lost those two days?

A. Yes sir.

Mr. Hanson: That has no bearing.

The Court: I agree with you, counsel. We are not concerned with how much, if any, such jobs pay.

(Testimony of Elizabeth Bronson.)

Q. What would you say as to the reasonable charge for somebody to take care of you for those two days, Monday and Tuesday?

A. Well, the reasonable charge — she lost ten dollars a day, but for the reasonable charge I wouldn't know. I imagine I would have to pay her ten dollars a day.

Q. With reference to somebody in a capacity for practical nurse?

A. That's right; or maybe more.

Q. Then what doctors did you see?

A. I seen Dr. Lee, I don't remember his first name, of Vallejo first.

Q. Then did you see further doctors?

A. Yes, I saw Dr. Grover of Vallejo.

Q. And then any other doctors?

A. Well, I saw Dr. Brockbank of Petaluma.

Q. And Dr. Brockbank has his office in Petaluma? A. That's right. [202]

Q. Somewhere along there did you move from Benecia over to Vallejo?

A. The first of March.

Q. Of 1955? A. That is right.

Q. Have you resided in Vallejo continuously from March first to the present time?

A. Yes sir.

Q. About how many trips did you make from Vallejo to Petaluma to see Dr. Brockbank?

A. I made a trip over there every week. I imagine close to 40 trips.

(Testimony of Elizabeth Bronson.)

Q. How did you get back and forth from Vallejo to Petaluma?

A. Up until we could make arrangements with Dr. Brockbank, I had to have my neighbors take me in the car, but we finally made arrangements with Dr. Brockbank to see me on Sunday when my daughter was home and she drove my car.

Q. With reference when you had the neighbors, how would you arrange with reference to the cost of transportation?

A. I paid two and a half different times. I just paid gas for the car, two and a half gas for the car each time and one time I think is three—every time my neighbors took me.

Q. Then with reference to the times you took your own car, it would take some gasoline, I would take it?

A. It would take about \$1.50 for gasoline.

Q. For the round trip? [203]

A. For the round trip.

Q. And have you progressed? In other words, what is your condition at the present time?

A. I have made quite a progress in my shoulder and my neck and my head, but yet I still am in so much pain at times that I can't sit down. My nerves are very bad.

Q. Now the pain you are in, is that a steady pain or comes and goes?

A. No, it is not a steady pain.

Q. Where is the pain when you do notice it?

A. It is in my head mostly now. My shoulder is

(Testimony of Elizabeth Bronson.)

better but my head is the one that pains me the most.

Q. Do you have any pain about the left shoulder?
A. I certainly do.

Q. Where is the pain when you have it?

A. Up to my neck and down to my lip.

Q. On the left?
A. On the left.

Q. Does that pain all the time or intermittant or how often?

A. It is intermittant, comes and goes, but if I am tired, like riding on the bus from Vallejo here, it pained me all night last night and still pains this morning.

Q. And how about your head, when you turn your head or move it up and down to the right or left, do you notice any pain?

A. I have to be awfully careful how I twist my head. I can move [204] it, yes, but I have to be very careful.

Q. Where do you notice pain?

A. Mostly from my left shoulder way up to my neck, up my left side.

Q. Do you notice any pain in back of your head on the other side?
A. Yes, I do.

Q. Now with reference to your left arm, what use, or lack of use of the shoulder and left arm do you have?

A. I can't pick things up, that is, move things of any weight at all. For instance, in canning fruit in summer, I can't tighten the fruit jars. I have to wait until my daughter came home to put my

(Testimony of Elizabeth Bronson.)

fruit in jars and she could tighten them down. I don't have any grip. I do have some, but not the way I used to.

Q. How about doing house duties, such as sweeping or running the vacuum cleaner or cooking? Does it affect you at all, or if not, so state.

A. With my minimum bit of work I could get along, but if I had to do a lot of work, I couldn't. My left arm and shoulder would be played out; I couldn't.

Q. Is there any large limitation of movement in your left shoulder? A. Yes there is.

Q. Tell us about that. [205]

A. I can't raise my arm above my head to the extent I did before and I can't get it behind.

Q. How about fastening and unfastening your brassieres? A. That's out.

Q. Could you do it before? A. I could.

Q. Is that because you can't get your left hand back? A. That's right.

Q. And did you do any work before the accident?

A. Yes, I was taking care of a little girl.

Q. And since you went back to Benecia have you done any taking care of children?

A. No, I have not.

Q. Why is that?

A. I just can't do it. My nerves are too bad.

Q. How much did you make before the accident, with reference to taking care of children?

A. I made \$15 a week.

(Testimony of Elizabeth Bronson.)

Q. Was that steady?

A. That was a steady income, five days a week.

Q. And since you say you haven't taken care of children?

A. No, I have not.

Q. Was that a steady job? In other words, was it for different children or——

A. Just one child. [206]

Q. Now with reference to your left shoulder itself, does it give you any discomfort, in the manner that you wear your clothes?

A. Yes.

Q. What is that?

A. Well, I have a lump on my left side. I try to fix it so it isn't noticeable and the straps from my slip, or anything I might wear, slips down and it is very discomforting.

Q. And why do the straps slip down?

A. Because my shoulder seems to be out of the socket and I have this lump up here and it slips off.

Q. I wonder if you would step down before the jury and just walk slowly, so as to show your right cheek. (Witness complies.)

Jury admonished and recess taken at 11:00 o'clock.

11:15 A.M.

Presence of the jury stipulated.

Mr. Wright: If the Court please, during the recess we had a conference with defendant's attorneys and they have stipulated, not that they are liable for the respective bills, because that is an issue for the jury, but with reference to the following bills that they were incurred on behalf of

(Testimony of Elizabeth Bronson.)

Mrs. Elizabeth Bronson as a result of this accident, and that if these respective people were called, they would testify that they were reasonable charges. That is correct?

Mr. Hanson: That is in the interest of time.

Mr. Wright: Elko Clinic, \$217.00; Elko General Hospital, \$398.95; H. B. Grover, M.D., Vallejo, \$10.00; Dr. Lee, Vallejo, \$3.00; Betty Jo Bronson, 2 days practical nursing, \$20.00; Alfreda Nielson, January 23, 1955, covers trip to Elko and return, total on bill, \$52.-5; Dr. Butler and Vern W. Ritter, radiologist, Santa Rosa, \$25.00; ambulance by City of Wells for taking all three patients from scene to Elko, \$35.00. Of course we only claim charges on that for one person—\$35.00 for three people. And I would like to file these bills, if the Court please, as plaintiffs' exhibit.

Court: Very well. They may be received as plaintiffs' Exhibit 17.

Mr. Wright: And also travel expense of plaintiff, Elizabeth Bronson, from Elko by train and her berth, which was \$21.54, Elko to Berkeley.

Mr. Hanson: That is under the same stipulation.

Mr. Wright: Same stipulation. And also meals on the train of Mrs. Bronson was \$1.50. Same stipulation.

Q. Mrs. Bronson, I do not think I asked you, did you notice what about the color of the wrecker from the time you saw it up until the time of the wreck? What did you notice about that?

A. I noticed the color was very light blue,

(Testimony of Elizabeth Bronson.)

blended in with the road so perfectly that I didn't notice it until we were skidding toward it.

Mr. Wright: I believe that is all the questions on direct. [208]

Cross Examination

Q. (By Mr. Pike): Mrs. Bronson, what was the condition of the highway right in the immediate vicinity before you came to the car that was off in the barrow pit on the right-hand side?

A. You mean from the top of the slope?

Q. Well, from the crest of the hill. Describe the road surface as you came down the hill.

A. I didn't observe the road at all until we started to skid. My eyes were glued to the truck and then to the objects that were to the side of the road. I can't say until we started in this skid.

Q. What was the condition of the highway, as far as the surface is concerned, right at the crest of the hill where you started down?

A. Well, I didn't observe the condition of the hill. You mean the road? A. Yes.

A. I was watching the truck.

Q. In other words, you don't know whether there was snow on it or whether it was dry or what?

A. I wasn't paying any attention. Mr. Duff was doing the driving and was doing a good job of it. I had no occasion to pay any attention. My eyes were drawn to the truck and from there to the wrecker at the side. [209]

Q. Is it a correct statement then that after you came over the crest of the hill that you didn't

(Testimony of Elizabeth Bronson.)

observe the surface of the road, the condition, as to whether it would be wet or was snow or ice or otherwise, until you started to skid?

A. I didn't.

Q. And approximately how far were you from the car in the barrow pit and the orange trailer when you started to skid?

A. To my knowledge we were, as far as I can judge—I am not too good a judge—but I would say from 100 to 150 feet.

Q. You stated you didn't observe the condition of the road from the crest of the hill on down until you started to skid. Will you please state what the condition of the road was for the last half mile before you came to the crest of the hill?

A. I know that part of the road was quite dry.

Q. Did you pay any attention to it, Mrs. Bronson, or is that just from, you might say, speculation on your part?

A. I did pay attention because I was watching the road then. There was nothing to stop my view and the road was quite clear and dry. There were wet spots along and possibly a few icy spots, but if any, they were not anything to worry about.

Q. Then going back a distance of more than half a mile, before you came to the crest of the hill, what were the road conditions?

A. That is back farther?

Q. Yes, farther on east from Wells.

A. There were icy spots there and some snow, not much, then very [210] little, just wet.

(Testimony of Elizabeth Bronson.)

Q. You were seated beside Mr. Duff in the front seat, of course, and you were awake?

A. That's right.

Q. And after you started down the crest of the hill, did you have any conversation with Mr. Duff?

A. No sir.

Q. Did you either say anything to him or did he say anything to you? A. No sir.

Q. Possibly to refresh your recollection, did you say anything to him about there being a car in the barrow pit?

A. I may have, but I don't recall. I may have said something.

Q. You wouldn't be positive, however, one way or the other, whether you did or didn't?

A. No, I wouldn't, but I don't think I did.

Q. I believe you testified that you saw the orange trailer and the car off to the right-hand side of the road about the time that the car in which you were a passenger passed the truck that was going in the opposite direction on the hill?

A. Immediately after, yes.

Q. And at that time did you look on past the two objects that were off to the side of the road and you identified, as you have, the trailer and car?

A. I may have, but I don't recall a thing.

Mr. Pike: That is all. [211]

Redirect Examination

Q. (By Mr. Wright): You spoke of some icy spots in the road from Wells to the crest of the hill. What were the size of those icy spots?

(Testimony of Elizabeth Bronson.)

A. They may have been the length of the car. They weren't large.

Q. And you spoke of some snow spots. How about the snow spots?

A. Such a few snow spots that they didn't amount to much.

Mr. Wright: That is all.

(Witness excused.)

JOHN A. DUFF

one of the plaintiffs, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Wright): Your name is John A. Duff? A. Yes sir.

Q. You are one of the plaintiffs in this action, are you not? A. Yes sir.

Q. You live in Burley, Idaho?

A. Yes sir.

Q. What is your age please?

A. Sixty-six.

Q. How long have you lived in Burley, Idaho?

A. In Burley about two years.

Q. How about that vicinity around Burley, Idaho? A. Paul, Idaho.

Q. About how long have you lived in Paul?

A. Well, since we came back from California, about six years.

Q. Calling your attention to December 31, 1954, did you leave Burley, Idaho? A. Yes sir.

Q. And accompanied by your wife and Mrs.

(Testimony of John A. Duff.)

Bronson? A. Yes sir.

Q. And of course it has been testified, but your testimony would be the same, about going through Twin Falls to the Nevada line, through Contact and down to Wells? A. Yes sir.

Q. Now did you encounter any snow before you got to Wells, Nevada? A. Yes sir.

Q. Where?

A. Between the Nevada line and Wells.

Q. And what was the degree of snow, or how much? A. You mean how big it was?

Q. Well, yes, did it cover the highway or partially, or what? A. It covered the highway.

Q. And you were in your new 1955 De Soto sedan automobile? A. Yes sir.

Q. And I requested that you bring your certificate of title, so we can get the weight of it. Did you do that? A. It is down in the car.

Q. Did you check it and find out? [213]

A. No, I didn't, I forgot about it.

Q. Will you do that so we will have it after lunch? A. Yes.

Q. When you got to Wells, Nevada, did you stop or go through?

A. No, we didn't stop at Wells.

Q. As you went through Wells, Nevada, what was the seating arrangement of the passengers and who was driving?

A. I was driving and my sister-in-law, Mrs. Bronson, was seated side of me.

Q. Where was your wife, Mrs. Jennie R. Duff?

(Testimony of John A. Duff.)

A. She was in the back seat.

Q. And this automobile was a '55 De Soto sedan automobile? A. Yes.

Q. Purchased the latter part of December of 1954? We call it '55. A. '55.

Q. About how many miles did you have on the car when you started out?

A. When we started out I judge 200 some odd miles.

Q. Had you driven the car before you started out that day? A. Yes sir.

Q. Had you had any instructions from the dealer concerning the operation of the car?

A. Yes sir.

Q. And the speed as to what you were to break the car in? [214] A. Yes.

Mr. Hanson: Object to that as hearsay testimony.

Mr. Wright: I am just asking if he had instructions, not what they were.

The Court: You have asked him what they were. The objection is good. Sustained.

Q. Now take after you left Wells, Nevada. Tell us what you observed on the road. You are acquainted with the fact the accident occurred, are you not? You have heard us speak of the crest of the hill? A. Yes sir.

Q. Would you keep that in mind in giving us the description, the crest, when you speak of that, as being the crest immediately east of where the collision occurred. Now will you describe the con-

(Testimony of John A. Duff.)

dition of the road from Wells, Nevada up to that crest of the hill please?

Mr. Pike: State more definitely—immediately.

Mr. Wright: It is approximately one-half mile east of where the accident occurred.

The Court: Ask if there was an accident.

Q. Was there an accident involving your 1955 De Soto automobile? A. Yes sir.

Q. Do you know where that took place?

A. Yes sir. [215]

Q. Was there a crest of the hill to the east of where the accident took place? A. Yes.

Q. Now let us speak of that and call it the crest of the hill from now on please. Describe the condition of the road that you encountered from Wells to the crest of the hill.

A. From Wells on up to the top of the hill, this side of the underpass, it was snow and slush and after we got farther up there the road began to get better and they were wet in spots and icy spots and the farther we got on the west highway it began to get dry, just damp in spots.

Q. Going right out of Wells, Nevada, to the underpass, what was that condition?

A. Snow and slush.

Q. And from there?

A. From there kept getting better all the way up.

Q. Before you arrived at the crest of the hill, describe the contour of the road, as to up, down, flat, etc.

(Testimony of John A. Duff.)

A. Well, it wasn't flat, just gradually come up. It wasn't steep.

Q. And what was the condition of the road, say within a half mile before you arrived at the crest of that hill? A. The road was good.

Q. And by good, what do you mean by that?

A. It was dry. [216]

Q. And as you went over the crest of the hill, or approached the crest of the hill, what speed were you going? A. About forty an hour.

Q. As you went over the crest, tell us what you did and what you observed, please.

A. When I started over the crest of the hill, I had taken my foot off the accelerator and I could see that the highway was icy.

Q. And did you see any objects, please?

A. Yes, I seen a truck coming up the hill.

Q. Did you see any other objects before you arrived at the truck? A. Yes, before——

Mr. Hanson: Objected to as leading.

The Court: You may answer. I think we are just getting some preliminaries.

Mr. Hanson: I will withdraw the objection.

Q. Did you see any other objects besides the truck? A. Yes.

Q. What objects did you see?

A. It was an orange colored trailer and a black car.

Q. Tell us in what relationship you saw the orange trailer and the car and the truck, which you saw first, second, and third.

(Testimony of John A. Duff.)

A. Well, I seen the truck first and then I seen the orange trailer and before I got there I saw the orange trailer and [217] black car.

Q. Before you got there?

A. I mean after I got close to the truck I didn't notice the orange trailer because the road was slick and I was applying my brakes as much as I could to keep from going into a slide and I watched the truck until I got past the truck.

Q. You went by the truck then?

A. Yes sir.

Q. Where was it that you went by the truck, about what part, with reference to the hill, the foot of the hill, what point? Fix that for us.

A. I imagine about half way up, a little more.

Q. Then after you passed the truck, what did you do?

A. Then I kept applying my brakes and looked down the road and seen this here U-Haul trailer and black car. I was trying to stop.

Q. You say you looked down the road. How far did you look after you passed the truck?

A. Down the road, I looked down the road, past the orange trailer and the car.

Q. Did you see at that time any other objects on the road? A. No sir.

Q. Then you went on down the hill. Tell us how long you kept touching these brakes, putting them on, what further you saw, if anything? [218]

A. I kept putting them on all the way down the hill until I got to about 175 or 200 feet and I

(Testimony of John A. Duff.)

sighted this here light blue car with the light top on it and then——

Q. You saw a car?

A. Trailer, I mean the wrecker.

Q. Now did you notice what effect, if any, did your brakes have going down the hill, on your automobile? Did it slow down?

A. Not much. It couldn't slow down much. If you slow down, you start to slide. It seemed like it wouldn't slow down any at all because on my car you see it had a fluid drive.

Q. Did you have any compression going down?

A. No. No compression. You don't get compression—a little bit, but not much.

Q. About how far were you from this wrecker when you first saw it?

A. About 175 or 200 feet, somewhere in that neighborhood.

Q. What part of the highway did that wrecker occupy?

A. The wrecker, the front end, was about center of the highway, close to the center of the highway and towards the shoulder.

Q. Did you make any observation as to distance between the rear of the wrecker and the U-Haul trailer? A. Yes sir.

Q. What distance did you estimate?

A. It looked about 8 to 10 feet.

Q. In between? [219] A. Between.

Q. What, if anything, did you do when you saw that wrecker?

(Testimony of John A. Duff.)

A. When I saw the wrecker, I thought I could go between the wrecker and the U-Haul trailer off the shoulder and then I started to turn to go between the two on that shoulder and then when I put on the brakes we went sideways, when I made the turn, my car slid sideways.

Q. Slid sideways and how far did it slide and where did it slide to?

A. It slid and hit into the wrecker.

Q. Where, with reference to the right, did it anglewise across the road or straight down, or which direction?

A. It was sitting on an angle.

Q. Did you slide down the road or did you parallel the road or more to your right or to your left?

A. I slid to my right.

Q. And how much?

A. Well, I couldn't say exactly.

Q. What part of your vehicle came in contact with what part of the wrecker?

A. The left-hand side.

Q. Of your car? A. Of my car.

Q. And more specifically, what parts of your left-hand side?

A. Well, just the frame of the front door on the left-hand side [220] and I hit towards the back of his wrecker and it hit my left side.

Q. Did any part of your front of your car strike any part of the wrecker? A. No sir.

Q. Then what happened to your car afterwards, if you know, or can you tell us where your car went

(Testimony of John A. Duff.)

to and where it stopped? Did you observe that while it was moving or afterwards when your car came to a stop?

A. Well, I came to a stop as I hit the U-Haul trailer.

Q. Did you observe the hitting of the U-Haul trailer, or did you find it out later?

A. Found it out later.

Q. What do you remember next after the accident from the impact with the wrecker? What was the next thing that you recalled or recognized?

Q. The next I remembered is when the wrecker came with the dome light on top. That brought my attention. That is the first thing I remember.

Q. Which wrecker was that? Any other there than testified in this case so far?

A. Well, yes, I believe some wrecker from the Ford Garage, I think from Elko.

Q. And after the impact, did you see the Page wrecker around?

A. No. I never did see it after the impact. [221]

Q. Did you see Mr. Page? A. No sir.

Q. Did you talk to him? A. No sir.

Q. What can you tell us about the color of that wrecker that you saw in the road, with which you collided?

A. It looked to be a light blue color.

Q. And what was the road on past the wrecker, as to the color of the highway itself?

A. Well, it was ice and just blended in with the

(Testimony of John A. Duff.)

ice, this wrecker blended in with the ice, and I couldn't see it until I was right on it.

Q. Why did you turn to your right instead of turning to your left?

A. Well, the slope of the highway to the north was steep and——

Q. You say to the north?

A. To the south.

Q. That would be your left-hand side?

A. That would be my left, and it was slick ice and then I noticed it was better for me to go around that way. You couldn't see down the highway, whether anyone else was coming or not. It was easier to go between.

Q. You say easier in your position to go in the back rather than the front? A. Yes sir. [222]

Q. You said something about the road sloping, which way did it slope?

A. It sloped to the south.

Q. What was the condition of the gulley or ditch of the highway down on the left, as compared to the right?

A. To the right side it was kind of a cut, but the other side was a gulley; it was deep.

Q. I think you said something about gravel?

A. The gravel was on the right-hand side of the shoulder.

Q. And if you could have gotten on the right-hand shoulder, tell us the effect.

A. If I could get on to the gravel, I could brake

(Testimony of John A. Duff.)

the car better because the gravel would slow me down a little bit.

Q. Did you observe any lights on the tow wrecker? A. You mean Mr. Page's?

Q. Yes. A. No lights on his.

Q. Did you see any flagmen at the top of the hill, or any flares or signs or anything like that, before you got to the top? A. No sir.

Q. Or any place down the hill, did you see any of those things? A. No.

Q. Did you see anybody flagging traffic?

A. No sir.

Q. Could you tell us about how much you slowed down by reason of [223] your coming down the hill there when you started to slide, turn to the right? About what was your speed in comparison with ordinary when you came over the top of the hill?

A. I couldn't tell you exactly what my speed was.

Q. Did you look at your speedometer going down that hill at all? A. No sir.

Q. Your eyes were other places?

A. My eyes were other places.

Q. And, of course, during that period of time your automobile was moving down the hill?

A. Yes sir.

Q. After the accident—you have heard the testimony—you went to the hospital? A. Yes.

Q. And you went in the ambulance, I take it, with your wife? A. Yes.

Q. And you were in the hospital for a few days?

(Testimony of John A. Duff.)

A. Twelve days.

Q. And then what did you notice, just briefly, about any pains, bruises about your body, while you were in the hospital?

A. My chest hurt me. My chest hurt me and broke some ribs and my back hurt me.

Q. Was that on the left or right side of the back? A. Left, up towards the center.

Q. What area? That is what we might describe as the small of [224] the back?

A. Small of the back.

Q. By the time you got out of the hospital, how did your ribs feel—did they put anything around you at all?

A. Yes, I had one of those harnesses they put around me.

Q. Did they feel better by the time you left the hospital?

A. Yes, they felt a little better, not much.

Q. And then you went home, I take it?

A. Yes sir.

Q. Did you have your glasses with you the day the accident happened? A. Yes sir.

Q. Did you have glasses on? A. Yes sir.

Q. What kind were they, bi-focles or sun type?

A. Bi-focles.

Q. What kind of vision did you have with those glasses? A. Good vision.

Q. What happened to them? Did they get broken in the accident?

A. They got broken in the accident.

(Testimony of John A. Duff.)

Q. Were you cut about your head at all?

A. Just across here.

Q. Pointing to your left eyebrow and more or less the middle of your forehead?

A. About that. [225]

Q. Did you notice anything about your head aching anything like that after the accident?

A. Oh yes.

Q. About how long did that last?

A. Oh until about the time I left the hospital.

Q. And then you went home and then did you go back when your wife left the hospital and went by air ambulance?

A. Yes sir.

Q. And you went with her, I take it?

A. Yes sir.

Q. How long did that pain seem to persist, or do you still have some pain yet, or what is the condition? Briefly, more or less.

A. Well, my chest hurt me and my back hurt me for quite a while after it happened. It hurts me a little yet. My back and my chest hurts me a little bit; that is, if I do anything.

Q. What was your occupation before the accident?

A. I am a contractor and builder.

Q. What type of buildings?

A. Homes.

Q. Did you have any project, any home, under construction on December 31, 1954?

A. Yes sir.

Q. What was the stage of the house?

A. It just had the roof on and being enclosed.

(Testimony of John A. Duff.)

Q. Was it enclosed where you could proceed with your work? A. Oh yes. [226]

Q. And this was a vacation for you and your wife that you were going on? A. Yes sir.

Q. About how long did you plan on that?

A. Ten days or two weeks.

Q. To California and different places?

A. Yes sir.

Q. To see relatives?

A. Yes. I have a sister in Santa Rosa. I have a son down there and going to see her sister and her son and my stepson and my sister.

Q. About how long would it be before you get back to Burley?

A. We were coming back to Burley for ten days or two weeks.

Q. So you did have a project where you would work and contribute your services? In your work on your house, did you contribute any physical labor yourself? A. Yes sir.

Q. Tell us about that.

A. I worked and supervised the job.

Q. What kind of work would you do on that job?

A. Laying out the carpenter work too.

Q. Then did you resume, when you got out of the hospital, did you resume that project, go ahead with the construction, or what part did you do or didn't do there?

A. No, I didn't go ahead with it. [227]

Q. Why not? A. Because I wasn't able to.

(Testimony of John A. Duff.)

Q. And then did you later on go ahead with the house?

A. No, not for three or four months.

Q. And was that a period that you fixed more or less that you felt that you could have gone ahead with the work? In other words, I am trying to get your time element when you feel you could have gone back to work. Your ability.

A. No, I wasn't able to.

Q. How long did that situation last?

A. About three or four months, maybe a little longer.

Q. And can you tell us anything about the value of such type of work you were doing on the house before the accident?

Mr. Hanson: I object on the ground no foundation laid and not a proper element of damage to this man.

The Court: The Court seems a little bit confused at this point. Did you ask the witness when he went back to work, if he ever did?

Mr. Wright: I will ask that question.

Q. When, if you did, did you go back to work? When did you go back to work on that house, or do any kind of work?

A. I didn't go back to work on the house. I didn't have no men. I let my men go; I didn't go back to work.

Q. Did you do any other type of work after you went home from the hospital? [228]

A. No sir.

(Testimony of John A. Duff.)

Q. What type of physical work were you able to do at the time of the accident?

A. Carpenter work.

Q. And on that particular building would there be any work that you intended to do when you got back from this trip?

A. Yes sir, I intended to finish it.

Q. Would there be any physical work for you to do?

A. I had to finish laying out. I had two men and I work with them because I always work with my men.

Q. Are you acquainted with the different wage scales in Burley, Idaho?

A. Yes sir.

Q. And can you tell us what would be the scale for a person laying out work and doing physical work like you were doing before the accident?

Mr. Hanson: I am going to object on the same ground, no foundation laid to show that he was getting any salary. Was he getting a salary or drawing a salary and the books, of course, are the best evidence.

The Court: As I say, I am still confused.

Mr. Wright: I will let that phase go until after recess and we can take it up and save time of the jury, if the Court please.

Q. Now your automobile, what color was your automobile? [229]

A. Mine has a white top and real light green.

Q. If I show you a picture of it, would you recognize the condition after you saw it?

(Testimony of John A. Duff.)

A. Yes sir.

Q. Where did you see your car next?

A. Burley, Idaho.

Q. And did you, at your request, have it towed?

A. Yes sir.

Q. It was towed from where?

A. From Wells, Nevada to Burley.

Q. And what motor company or tow man did that?

A. Bronk Motor Company.

Q. And you have bills for that?

A. Yes sir.

Q. Did you have your car repaired?

A. Yes sir.

Q. What kind of a car was it? Give a more specific description of it with reference to model and the type and name?

A. Mine was Fireflight De Soto.

Q. Two or four-door sedan?

A. Four-door sedan.

Q. I suppose it had the extra tire?

A. Yes sir.

Q. And did it have a radio?

A. No sir, no radio. [230]

Q. It had a heater?

A. Had a heater.

Q. What was the cost price of such a vehicle in December, 1954—'55 car?

A. \$3400.

Q. Did you have it repaired after the accident?

A. Yes sir.

Q. Where?

A. Bronk Motor Company.

Q. You have the repair bills?

A. Yes sir.

(Testimony of John A. Duff.)

Q. And has that been paid? A. Yes sir.

Q. And who paid the repair bill?

A. I did.

Q. Do you have cancelled check for that?

A. Yes sir.

Q. How about the Bronk Motor Company, have you paid the Bronk Motor Company for the tow-age? A. Yes sir.

Q. And you have those bills? A. Yes sir.

Q. With reference to Mrs. Jennie Duff, did you pay certain bills on Mrs. Duff's behalf?

A. Yes sir. [231]

Q. And the payment was made out of what kind of an account?

A. My wife and I have a joint account together.

Q. And it was paid out of the joint account?

A. Joint account.

Q. Then you have those bills? A. Yes sir.

Q. Why did you pay them, rather than Mrs. Duff issue the checks?

A. Well, I issued the checks because she was in the hospital and wasn't able to. She and I do business together, so I generally write the checks.

Q. Now what was Mrs. Duff's condition before this accident, with reference to taking care of the home? Did she hire any work done? How much work did you have to hire before the accident, please?

The Court: This may be a good place to interrupt counsel.

Jury admonished and noon recess taken at 12:00 o'clock.

Afternoon Session—November 14, 1954

1:30 p.m.

Presence of the jury stipulated.

Mr. Wright: If the Court please, counsel for the defendant and counsel for the plaintiffs have stipulated that the following items were incurred by the respective plaintiffs I will name, as a result of this collision. The defendant does not stipulate that he is liable for them, but if the respective people who did the work or doctors appeared, they would testify [232] that the charges were reasonable. With reference to Mr. John A. Duff, paid Dr. Charles A. Trehune \$10.00, for examination on June 7th; a receipt for payment by Mr. John A. Duff to Bronk Motor Company on 1-17-55 of towage and storage at the Page Garage and from the scene of the accident and to Burley, \$79.79; also charge of gas to John Duff that was used in the wrecker, towing from Wells to Burley, \$5.38; and also a repair bill to John Duff from the Bronk Motor Company, showing a total of parts, labor and material of \$2059.57, and I would like to introduce these in evidence, pursuant to the stipulation, if the Court please.

The Court: The offer may be received in evidence and marked as one exhibit, No. 18.

Mr. Wright: Also, if the Court please, the following under the same stipulation, for John A. Duff: Elko Clinic, \$80.00; Elko General Hospital, \$215.60; one pair of glasses, \$46.00.

Now with reference to Jennie R. Duff, if the Court please, the following are stipulated, that they were incurred as a result of this collision and that the respective people, if called, would testify that it was a reasonable charge.

Mr. Pike: I do not know about the first part.

Mr. Wright: What is the stipulation?

Mr. Pike: The same thing as we said as to John A. Duff, that we do not stipulate we are liable for these bills.

Mr. Wright: And you do not stipulate to liability? [233]

Mr. Pike: No.

Mr. Wright: These are all Jennie R. Duff: Elko Clinic, \$334.50; Elko General Hospital, \$431.05; and in addition thereto one-third of the ambulance from the scene to Elko, \$11.67; air ambulance from Elko to Burley, \$70.00; medicines and drugs, Miller Drug Company in Burley, \$56.50; Mrs. Hardy Sprague, housekeeper, \$22.00; Mrs. Arthur Gordon, housekeeper, \$167.50; additional item of Mrs. Gordon, \$16.00 for the same purpose; Dr. C. R. Kern, Jr., Elko, anesthetist, \$15.00; Dr. C. M. and E. H. Elmore, Burley, the joint doctor, \$12.00; Dr. O. W. Keen, Burley, \$9.00; the Cottage Hospital in Burley for X-rays taken, \$77.50; the Chester Artificial Limb and Brace Company, Boise, \$90.00; the bill of Dr. H. Terhune to November 5, 1955, \$250.00; travel expenses by automobile from Burley, Idaho to Boise to get the back brace, \$26.00.

In that connection, if the Court please, they could

probably all be stapled together and I would like to offer them for Mrs. Jennie R. Duff.

The Court: They will be received as one exhibit and marked Exhibit 19.

Mr. Wright: Then for Mr. John A. Duff, there would be one-third of the \$35.00 ambulance charge, \$11.66. I think, if the Court please, we were at the stage of asking Mr. Duff what work or household services Mrs. Duff performed before the accident.

MR. DUFF

resumed the witness stand on further [234]

Direct Examination

Q. (By Mr. Wright): Mr. Duff, at the time of the accident, were you and Mrs. Duff living together as husband and wife? A. Yes sir.

Q. How long had you been married?

A. Been married nearly 17 years.

Q. And you lived together during this entire period of time? A. Yes sir.

Q. At the time of the accident, and prior thereto, were you living in a home in Burley, Idaho? A. Yes sir.

Q. Did you folks own that home?

A. Yes sir.

Q. What work or services did your wife do in connection with the home, the meals and those other things about keeping house?

A. She done all of the work and cleaning the house and washing and everything that is done in the house.

Q. Did you send out any laundry before the col-

(Testimony of John A. Duff.)

lision? A. No sir, only suits to be pressed.

Q. Cleaning? A. Yes.

Q. After the accident, after she got home, what housework did she do?

A. After we got home——

Mr. Wright: I think, if the Court please, Mrs. Duff [235] has testified to that, so I won't go into it. I believe that is all the questions, if the Court please.

Cross Examination

Q. (By Mr. Hanson): Mr. Duff, will you agree with the general statement that it was about 4/10ths of a mile from the top of that hill where the accident occurred? A. Yes sir.

Q. And you could see that distance without difficulty, couldn't you? A. Yes sir.

Q. In fact, on that day you could see from one to two miles, except for natural terrain changes, hills or natural low places in the road, could you not?

A. Well, I don't know for two or three miles.

Q. I say one to two miles.

A. I couldn't swear to two miles.

Q. There wasn't anything in the atmosphere itself to inhibit your attention as you drove along, was there? A. No.

Q. And as you came over the top of this crest, you saw this car and orange trailer about the same time you saw the truck coming up the hill, didn't you? A. About.

(Testimony of John A. Duff.)

Q. And at the time you saw the truck and car, you were on that glassy ice at that time, weren't you? [236] A. Yes.

Q. Now so far as the truck was concerned, you weren't worried about that particularly at that time, were you? A. Well, a little.

Q. The truck was on its own side of the road?

A. It was on its own side of the road.

Q. And you were on your side?

A. I was on my side.

Q. And when you saw this car off the highway and this orange trailer, you knew an accident of some kind had happened, didn't you?

A. Yes, some kind of accident.

Q. Do you recall testifying at the hearing in Elko April, 1954, that you were not worried or not concerned about the truck as you came over that hill? A. No, I don't.

Q. Perhaps I could help you on that. I realize, Mr. Duff, sometimes as time goes on it is hard to remember all these things, and that is on page 226, starting about line 1, and the question is " * * * and approached the truck and passed the truck approaching your car? A. Yes sir. Q. Then you had no worry about the truck that was coming up towards you? A. No sir. Q. You weren't concerned with that because you saw he was on his side of the highway? A. I was on my side of the highway and he was on his side." Did you so testify in Elko at that [237] time?

A. I guess I must have.

(Testimony of John A. Duff.)

Q. Well, that is true, isn't it? A. Yes.

Q. Sure. You could see beyond that truck and you could see down where this car was, this orange trailer, and you knew at that time, as you testified a minute ago, that something had happened down there? A. Yes.

Q. And you intended to stop down there too, didn't you? A. Yes.

Q. As a matter of fact, as you got at that ice, you couldn't apply your brakes without going into a spin at that point? A. No sir.

Q. How fast were you going as you came over that crest, would you say?

A. About forty-five miles.

Q. Were you going any faster than that?

A. No. I didn't look at my speedometer.

Q. Could you have been going 45 to 50, or maybe even a little faster than that? A. No.

Q. Did you testify at this same hearing that you were going 45 miles an hour or better? [238]

A. About 45.

Q. Forty-five or better, forty-five to fifty?

A. Around that. I don't remember what I testified. I think 45 miles an hour.

Q. You could have been going a little faster than 45?

A. I might have been and might not.

Q. You didn't decrease the speed of your car when you went over that hill, other than letting up on the gas? A. Gas and applied my brakes.

(Testimony of John A. Duff.)

Q. In fact, you were still going at a pretty good rate when you hit that wrecker, weren't you?

A. No, I don't think so. I don't think I was going fast.

Q. The total repair on your car was \$2059.57, is that right? A. Correct.

Q. Can you describe for us generally just what damage was? A. What the damage was?

Q. Just describe the appearance of the car after the accident.

A. The left-hand side of the frame of the front appeared to hit there and pushed it over sideways to the right.

Q. And then how far did your car travel? Go ahead, excuse me.

A. It hit the door and glanced toward the rear fender. The right-hand side of the car wasn't hurt at all, the front part.

Q. Was there places on the door where it came in contact with the wrecker that was damaged or knocked in?

A. It was pushed over, yes sir. [239]

Q. What about the steering wheel itself, was that bent or damaged in any way?

A. Yes sir.

Q. What about the door panel and the left front fender, that part of your car, was that damages pretty badly, or damaged?

A. The panel of the door, you mean?

Q. Yes. A. Yes sir.

Q. In fact, the damage was quite extensive,

(Testimony of John A. Duff.)

wasn't it? A. Yes sir.

Q. For two thousand dollars you would have to have quite a bit of damage there?

A. Well, they put a new clutch in.

Q. Was it damaged that badly?

A. That's right.

Q. When your car struck the wrecker, how far did it knock the wrecker?

A. Well, that is something I can't tell you. I don't know how far.

Q. You say it was icy at the point where the impact occurred? A. Yes sir.

Q. And having in mind that ice and the damage done to your car, you still think you were doing less than 45 at the time the impact occurred?

A. Yes sir. [240]

Q. Do you know how far your car traveled after the impact?

A. No sir, I couldn't tell you that.

Q. Now when you left your home that morning, I think you told us you left about ten minutes to six? A. Yes sir.

Q. Where was the first place that you realized there was ice or snow on the highway?

A. Between Rogerson and the Nevada line.

Q. Did you stop at Twin Falls on your way to Wells? A. Yes sir, we stopped there.

Q. Did you find any more ice or snow from Rogerson on to Wells on the highway?

A. No, no ice. Found some snow because it was snowing.

(Testimony of John A. Duff.)

Q. Did that make the highway slippery where the snow was?

A. No, the highway wasn't slippery.

Q. When you got to Wells I think you told us the snow was melting, more slush?

A. Yes, when we come over the hill out of Wells it began to get soft and down in Wells it was slush.

Q. And then you say the highway was drier when you started up towards the place where the accident happened?

A. Yes sir.

Q. But there were icy spots here and there?

A. After we got on the hill out of Wells, from there on just icy spots. The farther we got, the drier the highway. [241]

Q. But there were little icy spots, as you say, as you proceeded on to where the impact occurred?

A. After we got over the crest.

Q. After you left Wells and before you got to the crest of the hill, immediately east of the scene, there were little icy spots along the highway in places, were there not?

A. Not very much, some, yes sir.

Q. When you saw little icy spots, did it occur to you that you might run into longer icy spots or more dangerous spots along that highway?

A. I thought the highway was getting better all the time from there because we got out of the snow-storm.

Q. You had lived in Idaho how many years before the accident happened?

A. Quite a few years.

(Testimony of John A. Duff.)

Q. Eighteen years, is that about right?

A. Yes.

Q. And you had driven in all types of weather, I suppose?

A. Yes sir.

Q. In the winter time?

A. Yes sir.

Q. And in your business, contracting business, you had occasion to drive when there was ice on the highway, have you not?

A. Yes sir.

Q. Did you ever drive up to Shoshone in the wintertime from [242] Burley?

A. No sir.

Q. Ever drive up to Malta, Graville, in the wintertime?

A. I don't know.

Q. Ever drive to Twin Falls?

A. Yes sir.

Q. And there are places along that highway where you run into slippery areas where there is ice on the road along the highway?

A. Yes sir.

Q. You know in this western country that conditions can change very often as you go along?

A. Yes sir.

Q. You knew at that time, in driving along this road, this range country, you might suddenly come to a slick spot, didn't you?

A. Well, not exactly.

Q. Well, did you think about that at the time?

A. No, I didn't. I thought the highway was good after we got out of Elko. I have traveled that road once or twice.

Q. You tell us you knew the highway after you got out of Elko and traveled it once or twice?

A. I don't know how many times.

(Testimony of John A. Duff.)

Q. But you had snow, these little spots, after you left Wells? A. Yes.

Q. And have you had to drive from Twin Falls down through Idaho traveling through snow? [243]

A. No.

Q. And on December 31, 1954, did it occur to you when you came over one of these rises you might hit a shady or icy spot?

A. No sir, it did not.

Q. As you came up this hill, did you decrease the speed of your car immediately east of the accident? A. No sir.

Q. You couldn't see over the top of the hill?

A. No sir.

Q. As you came up over that hill, not decreasing your speed, you didn't know what you were going to see on the other side, did you?

A. No sir.

Q. By the time you saw this car, this trailer, you were on the ice and going too fast to stop, weren't you? A. I couldn't stop.

Q. How long had you had this car before you left Burley? A. I got it Christmas Eve.

Q. About how much mileage would you say you had on it when you left Burley?

A. Around 200 miles, somewhere in that neighborhood.

Q. How far was it from Burley to where the accident happened, from your home?

A. Well, 46 miles to Twin Falls, say 110 miles to Wells from Twin Falls to Wells, and then 14

(Testimony of John A. Duff.)

miles, somewhere in that neighborhood, [244] west of Wells where I had the accident.

Q. In other words, you would say the mileage is somewhere over 400?

A. Four hundred twenty-seven.

Q. Would that be about right in your estimation?

A. Right around 427.

Q. This was a fluid drive car?

A. Yes sir.

Q. And you knew that at the time, of course, did you not, because you had been driving it since Christmas time?

A. Yes.

Q. And you know fluid drive cars are more difficult to perform sometimes on ice?

A. Sometimes.

Q. You say when you first saw this wrecker, it occurred to you if you went down on the right-hand side, between the wrecker and the orange trailer, you might get in the gravel there and slow up your speed?

A. I turned to the right-hand to get off the highway on the gravel shoulder on the north.

Q. Does that gravel shoulder extend all the way down from the crest of the hill?

A. I imagine it does.

Q. So if you had seen this wrecker at the same time you saw the car and orange trailer, you could have gone over that gravel [245] shoulder and sort of slowed yourself up?

A. Not very much.

Q. But you intended to stop, of course, as soon as you saw this wrecker out there, as an emergency?

(Testimony of John A. Duff.)

A. Yes sir, trying to stop.

Q. When you came down here to Carson City, did you drive your automobile, when you came down for the trial?

A. Mr. Bedko drove it.

Q. And you all came together in the automobile?

A. Yes sir.

Q. Mrs. Bronson too?

A. No, Mrs. Bronson didn't come.

Q. And you stopped in Elko, I suppose, on your way down?

A. Yes sir.

Q. And Mrs. Duff came in the car?

A. Yes sir.

Q. She was able to make the ride in the car without any difficulty?

A. Well, we stopped when she got tired.

Mr. Hanson: I think that is all.

Redirect Examination

Q. (By Mr. Wright): Do you remember, Mr. Duff, you got into Elko on a Thursday, on your way down to the trial?

A. This last time?

Q. Yes. [246]

A. Yes sir.

Q. Do you recall seeing me there that day at the hotel?

A. Yes sir, Commercial Hotel.

Q. Where was Mrs. Duff at that time?

A. She was at the hotel.

Q. What part of the hotel?

A. We were——

Q. I mean, what was she doing, in the room or down in the lobby or where?

A. I believe she was in the room.

(Testimony of John A. Duff.)

Q. What was she doing?

A. She was resting.

Q. What part of the room did she occupy?

A. She was sitting on the chair and I was in bed.

Q. Now with reference to the type of day, tell us about the sun there, with reference to the sky, sunlight or what was the condition?

A. When we arrived there?

Q. Yes, going down the hill in that area, what was the condition?

A. The sun was shining and the roads were good and dry.

Q. And where the accident happened, was the sun shining? A. Yes sir.

Q. I mean the day the accident occurred and you were proceeding from Wells coming to the scene, that 14 miles stretch.

A. Oh, the day of the accident? [247]

Q. Yes. A. Oh, it was cloudy and hazy.

Q. Tell us more about the type of clouds? What type of clouds? A. You mean the color of them?

Q. Well, no, as to whether—I don't want to ask any leading question. There are different types of clouds, are there not? A. Yes, sir.

Q. How would you describe the clouds on that day? A. They were light snow clouds.

Q. I think you said you thought the road was good when you left Elko, I believe that is your testimony on cross-examination. And you arrived at Elko, or did you mean Wells? You said in your

(Testimony of John A. Duff.)

answer to one of the questions you thought the road was good when you left Elko, before the accident occurred. Did you mean Elko or Wells?

A. Wells.

Q. Now before you arrived, that is, from Wells to the crest of this particular hill, did you go down any hills, or did you go over any hills before you arrived at that particular crest?

A. Yes, sir, we went over the rise, went up and down.

Q. What did you notice as to those other crests, before you arrived at this crest which was the crest just before the accident?

A. The road was good.

Q. How about where you went down the westward slope, what was [248] the condition before you arrived at this particular crest?

A. They were good.

Q. From Twin Falls to Wells you said was 110 miles. Can you tell us what distance it is from Contact to the State line of Idaho-Nevada to Wells?

A. The distance?

Q. Yes.

A. Well, a lot of them claim it is just about half way between Twin Falls and Wells; that would be approximately about 50 or 55 miles, somewhere in that distance.

Mr. Wright: No further questions.

(Witness excused.)

Mr. Wright: If the Court please, the plaintiffs rest.

The Court: The record will show that the plaintiffs rest their case.

CLIFFORD ELTON

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hanson): State your name, please?

A. Clifford Elton.

Q. Where do you live, Mr. Elton?

A. Wells, Nevada.

Q. What is your occupation? A. Mechanic.

Q. Do you know Mr. Page? [249] A. Yes.

Q. You married his daughter, did you?

A. Yes.

Q. Directing your attention to December 31, 1954, do you recall an accident involving the Page wrecker and DeSoto automobile about 14 miles west of Wells? A. Yes.

Q. Were you out there at the scene that day?

A. Yes.

Q. Do you recall the time you got the call there in the Page garage, notice of the accident?

A. Around 8:30.

Q. What time did you leave Wells?

A. Two or three minutes after.

Q. Who went out to the scene with you?

A. Mr. Page, myself and Leonard Jewell.

Q. Where is Leonard Jewell at the present time?

A. In Oregon.

Q. How old is he? A. Fourteen.

(Testimony of Clifford Elton.)

Q. How about road conditions between Wells and the crest of the hill immediately east of where the accident happened? A. They were slushy.

Q. What about the area of the highway from the crest of the hill on down to where the Shaw car was? [250] A. That was slushy also.

Q. Tell the Court and jury what you saw as you came over the crest of the hill travelling west?

A. Well, there was a car and trailer off on the right-hand side of the road, coming down the hill.

Q. What did you do, what did you people do with the wrecker when you arrived at the scene?

A. Well, we parked the wrecker off the side of the road and looked the car and trailer over to decide what would be the best way to get it up.

Q. Do you recall at that time whether or not there were any signal lights burning on the wrecker?

A. Yes, there was a red light.

Q. Is that the dome light?

A. It is the light on top of the cab of the wrecker.

Q. What did you do after that, so far as the wrecker was concerned?

A. We got the wrecker in position to get the trailer back on its wheels.

Q. And when you say "position," where was the wrecker when you got it in that position?

A. Well, it was facing—would be facing east by south, back in on the shoulder of the road, toward the trailer.

Q. Did you turn the trailer up on its wheels?

(Testimony of Clifford Elton.)

A. Yes. [251].

Q. On which side was the trailer laying when you first got there?

A. It would be on the right-hand side.

Q. Just tell us what you did to get it turned up on its wheels.

A. Well, we just unloosened the cable and pulled out and we got it back on its wheels.

Q. After you got it back on its wheels, with reference to the wrecker, where was the trailer, so far as the position of the two vehicles were concerned?

A. It would be almost immediately behind the wrecker.

Q. The trailer was? A. Yes.

Q. Do you have any estimate how far it was behind the wrecker at that time?

A. Probably three feet.

Q. Did you see the Duff car before it collided with the wrecker? A. No, I didn't.

Q. What were you doing just before that collision occurred?

A. Unhooking the trailer from the car.

Q. Were you hit by any of the vehicles following the impact?

A. I believe I was hit by something; I couldn't say for sure.

Q. What was your first notice of the accident?

A. Leonard Jewell called a warning. I don't know what he said, "Look out.", or something. [252]

Q. After you had collected yourself, following the impact, can you tell us about where the different

(Testimony of Clifford Elton.)

vehicles were, following the impact, between the Duff and Page wrecker, where they were with reference to each other?

A. Well, the car was farther down in the barrow pit and the trailer was shoved into the car and the DeSoto was on the right-hand shoulder of the road. I don't believe any of them were actually in the barrow pit. Two right wheels may have been just over the shoulder of the road, and the wrecker was skidded down the highway and facing, I would say, almost parallel.

Q. That is, the front edge of the wrecker would be facing towards the east?

A. Would be east, yes.

Q. Did you make any observations whether or not the impact had knocked the wrecker any distance? A. Well, it would have had to, yes.

Q. Just tell what you saw, if you remember making any observation about it.

A. Well, I wouldn't know how many feet, but the rear end would have had to have been knocked clear around.

Q. Was there any traffic on this highway before this accident between the Duff car and the wrecker car? A. Yes.

Q. Did you observe any other cars going past the wrecker before [253] that time?

A. Yes, there were cars.

Q. Where was the front end of the wrecker, with reference to the center of the hard surface part of the highway, before the collision happened?

(Testimony of Clifford Elton.)

A. I would say probably five feet to the right of the center.

Q. That would be to the north of the center line?

A. That would be to the north.

Q. Those cars you saw go past before the impact, did any of those cars have difficulty in going around the wrecker and passing it?

A. Not to my knowledge.

Q. What about the area of the surface of the highway where the impact occurred? Can you describe that as it appeared to you at the time, as the wrecker came down, immediately to the east of where the impact was?

A. Well, I wouldn't know exactly, but there were a lot of places where you could see the highway. The highway was wet, slush.

Q. Would that be immediately east of where the collision happened?

A. Well, I would say yes.

Q. What was the color of the wrecker before this impact occurred?

A. Two-tone, dark blue and lighter blue.

Q. What part is the darker blue? [254]

A. The bottom portion.

Q. And what color is the top portion?

A. Light blue, the top.

Mr. Hanson: Your witness.

Cross Examination

Q. (By Mr. Taber): Mr. Page is your father-in-law? A. Yes.

(Testimony of Clifford Elton.)

Q. How long have you been employed by him?

A. I was employed about one year.

Q. At the time—— A. Before the accident.

Q. You had been employed by him about a year?

A. Yes.

Q. You were an employee of his on December 31, 1954, isn't that true? A. Yes.

Q. And in going out there in answer to this call, you were working for Mr. Page, is that true?

A. Yes.

Q. In fact, that was part of your duties, to answer these calls with the wrecker, isn't that right?

A. Yes.

Q. Now you say that Mr. Page's Studebaker wrecker was a two-tone blue color? A. Yes.

Q. And the dark blue was toward the bottom of the vehicle? A. Yes.

Q. And the light blue toward the top, is that right? A. Yes.

Q. I show you plaintiffs' Exhibit 5, plaintiffs' Exhibit 4, plaintiffs' Exhibit 7 and plaintiffs' Exhibit 6, and ask you to examine those photographs. Do you recognize the vehicle which is shown in all those photographs, Mr. Elton? A. Yes.

Q. Whose vehicle is it?

A. It is the Page Garage wrecker.

Q. Do you recall when those photographs were taken? A. No, I don't.

Q. Can you tell, by examining the photographs, when the photographs were taken?

(Testimony of Clifford Elton.)

A. Well, they should have been taken shortly after the wreck.

Q. And do these pictures show the dark color blue—I am referring now to plaintiffs' Exhibit 4—does plaintiffs' Exhibit 4 show the dark blue of the Page wrecker?

Mr. Hanson: I think the picture speaks for itself.

Mr. Taber: I will withdraw the question.

Q. Would you point out to me, and to the members of the jury, on plaintiffs' Exhibit 4 just what portion of the Page truck was the dark portion?

A. Yes, from this line down is much darker blue than that portion. [256]

Q. And what portion, referring again to plaintiffs' Exhibit 4, was a light blue?

A. From the line just below up on top.

Q. Where did Mr. Page store this wrecker, Mr. Elton, where did he keep it? A. In the garage.

Q. And he kept it there at all times?

A. Except during the day it was parked outside.

Q. And where did he park it outside the garage?

A. Usually directly across the street.

Q. Was that true for the year preceding December 31, 1954?

A. Well, generally, yes. It wasn't a standing order that it be parked there, but normally it was.

Q. The greater portion of that year preceding December 31, 1954, the car or wrecker was outside the garage in the daytime and it was moved into the garage at night, isn't that true? A. Yes.

Q. Now you say there was other traffic on the

(Testimony of Clifford Elton.)

highway before you arrived at the scene where the U-Haul trailer and the other car were off the road?

A. Yes.

Q. Approximately how many cars went by the scene there from the time you arrived until the collision occurred?

A. Well, I wouldn't know. There were several.

Q. Well, would that be one or two, or approximately how many?

A. There were more than that. I didn't count them, but there must have been ten at least.

Q. There were ten at least? A. Yes.

Q. And you say that those other cars had no difficulty in getting by the place where the wrecker was parked on the highway? A. No.

Q. What were you doing at the time these other cars went by?

A. Well, inspecting the situation, the trailer and car, to see how the best way would be to right the trailer, put it up on its wheels.

Q. From the time you arrived until the collision occurred, as a matter of fact, Mr. Elton, you were busy engaged in trying to right this U-Haul trailer, to put it back on its wheels, isn't that true?

A. After we had looked at it.

Q. You recall arriving out here at the scene of this collision do you not? A. Yes.

Q. About what time was that?

A. Around nine o'clock, I think.

Q. And what time did the collision occur?

A. Possibly 9:30. [258]

(Testimony of Clifford Elton.)

Q. So that for a half hour you were busily engaged, were you not, in servicing the U-Haul trailer in the barrow pit and in putting the wrecker into position on the highway, isn't that true?

A. Yes.

Q. And in attaching the cable to the U-Haul trailer, so that you could right it, put it back on its wheels?

A. Yes.

Q. And at the time the collision occurred, you had succeeded, had you not, Mr. Elton, in righting the U-Haul trailer?

A. Yes.

Q. So it took you about a half hour to accomplish that job, isn't that true?

A. Yes.

Q. Who assisted you in that work?

A. Mr. Page.

Q. How did he assist you?

A. Well, by giving instructions, more or less supervising.

Q. In other words, Mr. Page told you how to perform the job, isn't that true?

A. Yes.

Q. And he told you to place the wrecker in the position that you placed it, isn't that true?

A. I don't know if he said in so many words to put it exactly there, but it was agreed the way we done it was the way we did. [259]

Q. When you first arrived out there, you parked the wrecker on the shoulder of the road, if I understand your testimony?

A. Yes.

Q. In other words, parking it in a position near the U-Haul trailer, isn't that true?

A. Yes.

Q. From that position, let me ask you if the

(Testimony of Clifford Elton.)

boom of that wrecker would extend out and over where the U-Haul trailer was situated?

A. Yes.

Q. And you used a cable on the boom and a winch, isn't that true? A. Yes.

Q. You attached it to the U-Haul trailer in order to right it, bring it back on its wheels? A. Yes.

Q. Now from the position, when you first drew up there on the shoulder of the highway, couldn't you have righted the U-Haul trailer from that position?

A. I don't know if we could have lifted it.

Q. You think it could have been done that way?

A. Well, I would say it was possible; I don't know.

Q. You didn't try to? A. No.

Q. Now you had proceeded to the point of merely putting the [259-A] U-Haul trailer back on its wheels when this collision occurred, isn't that true?

A. Yes.

Q. You were engaged most of the time in doing that work, from the time you arrived until the collision occurred, is that true? A. Yes.

Q. Now you say there were other cars that went by the scene and had no difficulty in going past the wrecker. Did you watch them?

A. No, I can't say I did.

Q. How can you tell us, then, that these other cars had no difficulty in going past the wrecker?

A. I believe I said they had no difficulty to my knowledge.

(Testimony of Clifford Elton.)

Q. Did you watch them as they went by?

A. No.

Q. Did you watch cars from the crest of the hill east of where this collision occurred and they proceeded in a westerly direction down the hill?

A. After we arrived, no.

Q. Did you watch cars as they proceeded in an easterly direction, past the scene of where this collision occurred?

A. No, only while we were travelling down the hill ourselves.

Q. Were there any trucks that went by?

A. I couldn't say for sure.

Q. But you didn't watch these other cars, if I understand you [260] correctly, and you told us the other cars had no difficulty in getting by, is that true?

A. To my knowledge they didn't.

Q. Now if I understand you correctly, it took approximately a half hour to put the U-Haul trailer back on its wheels?

A. Yes.

Q. And during that time where was the wrecker on the highway?

A. Well, it was back facing in a southeast direction. It was about five feet from the right of the center line, I guess.

Q. When you say five feet to the right of the center line, you mean that the front end of the wrecker was approximately five feet north of the center line, is that true?

A. Yes.

Q. What is the actual length of that wrecker, Mr. Elton?

(Testimony of Clifford Elton.)

A. I don't know. I have to guess—between, close to 20 feet.

Q. At what sort of an angle was that wrecker placed across the west-bound lane of traffic?

A. Well, I don't know what the degree of angle would be, but the rear end of the wrecker was out on the shoulder, with the front end upon the highway.

Q. You are unable to tell us anything about the angle that pointed across the highway? A. No.

Q. After you arrived, did you determine why this car and trailer were off the road? What caused the car and trailer to be off [261] the road?

A. Well, I assumed it was slippery roads.

Q. Who drove the Studebaker wrecker truck from Wells out to the scene of where this collision took place? A. I did.

Q. And you say that Mr. Page and his grandson were also in the wrecker? A. Yes.

Q. And as you drove then, I assume, that the boy sat in the middle and Mr. Page on the outside, is that true? A. Yes.

Q. Did you have chains on the Studebaker wrecker? A. No.

Q. How fast did you drive from Wells out to the place where the car and the U-Haul trailer were off the road?

A. Probably around 30 or 35 miles.

Q. And what was the condition of the road from Wells to the crest of the hill just east of where you found the U-Haul trailer?

(Testimony of Clifford Elton.)

A. They were slushy, wet.

Q. And would you say that it was slushy all the way from Wells to that point?

A. Well, I believe it was more slippery and more snow back in Wells. As we proceeded west, there were a lot of bare wet spots on the highway, slush.

Q. And were there any dry spots on the road?

A. No.

Q. No dry spots? A. No.

Q. So that the road from Wells, out to the crest of this hill, was slushy and wet? A. Yes.

Q. There were no dry spots?

A. Not to my knowledge.

Q. Did you know that that wrecker was equipped with two signs approximately 20 x 30, white with red lettering, which read, "Danger," "Look ahead"?

A. Yes.

Q. Did you know that the wrecker was equipped with six flares of the kerosene burning type?

A. Yes.

Q. Did you know that the wrecker was equipped with four flares of the reflector type? A. Yes.

Q. Now what was the condition of the road, Mr. Elton, from the crest of this hill down to where you found the U-Haul trailer?

A. Well, I would say wet and slushy.

Q. It was wet and slushy? A. Yes.

Q. And you went over it, then you determined that that road was wet and slushy, at approximately 9:30? [263]

A. Yes, shortly before that, I guess.

(Testimony of Clifford Elton.)

Q. Was there any change in the weather from 9:30 that morning until 10:00 o'clock that morning?

A. Not noticeable, I don't believe.

Q. That is, it didn't get colder or warmer?

A. Not noticeably, I don't believe.

Q. Was there any change in the weather from 10:00 o'clock to 10:30 that morning?

A. Well, I don't recall any drastic changes.

Q. What was the boy doing all this time, do you know, Mr. Elton? By the boy, referring to Leonard Jewell.

A. He was standing off to one side, just watching.

Q. Do you recognize this drawing on the blackboard? A. Yes.

Q. Are you oriented to this tape in the north bottom center? A. Yes.

Q. To your left would be west, to your right east? A. Yes.

Q. You say the boy stood around and watched?

A. Well, I would say he was to the right of the tape itself, back and north.

Q. To the right of the tape? A. Yes.

Q. Where is that?

A. That would be east of the tape.

Q. In this vicinity? [264]

A. Yes, a little farther north.

Q. Off the road? A. Yes.

Q. And he stood and watched, is that true?

A. Yes.

(Testimony of Clifford Elton.)

Q. Do you know what time, approximately, this collision took place?

A. I imagine shortly before ten.

Q. You arrived——

A. Probably between 9:30 and 10:00.

Q. You answered the call at 8:30 and you arrived at 9:30? A. Shortly after nine.

Q. So that during that one-half hour Leonard Jewell was around watching, you were busily engaged trying to right the U-Haul trailer and what was Mr. Page doing?

A. He was there supervising.

Q. I am going to ask you—maybe I have asked this question before; if I have, your Honor will excuse me—how long did it take you to get the U-Haul trailer back on to the wheels from the time you arrived at the scene?

A. Approximately a half hour.

Q. And after you had righted the U-Haul trailer, how long was it from that time until the collision occurred? A. Probably just a few minutes.

Q. Mr. Elton, would you mind stepping down here to the blackboard. [265] You say you are oriented to this diagram on the blackboard and draw in the position of the Studebaker wrecker truck of Mr. Page's after the collision between this other car and the wrecker.

A. Well, I would say it would be almost where this "1" is, approximately down here.

Mr. Hanson: You are referring to "W-1"?

(Testimony of Clifford Elton.)

Mr. Taber: Well, counsel has just taken the words out of my mouth.

A. This is after the impact?

Q. Yes.

A. I would say somewhere right about that position.

Q. And you have drawn a rectangle and you have indicated the point, indicating the direction in which the Page wrecker was facing, is that right?

A. Yes.

Q. Now with the consent of counsel, I will mark that "W-2", and suppose I indicate on this by heavy dash chalk marks, sort of perforated lines, is that agreeable?

Mr. Hanson: Agreeable.

Mr. Taber: That is all, thank you, Mr. Elton.

Redirect Examination

Q. (By Mr. Hanson): You have here a list of equipment the truck had. I wonder if you would object to writing the dimensions of the dome light?

Mr. Taber: Not at all. [266]

Q. Can you describe the dome light you say was blinking on top of the truck before the accident?

A. Well, it is mounted on top of the cab and it is approximately eight inches high and probably five inches in diameter, the blinker type.

Mr. Hanson: Would you mark the back of the photograph?

Mr. Wright: So stipulated. I would suggest that we not put the actual board in, but by stipula-

(Testimony of Clifford Elton.)

tion take the photograph and then put the photograph in; then mark the exhibit number on it. In other words, I won't stipulate the blackboard itself can go in evidence, only the photograph be taken.

The Court: Stipulated that the board, showing the present diagram, may be photographed and that photograph will be introduced in evidence as defendant's Exhibit B.

Mr. Taber: Let us have it plaintiffs' next in order.

The Court: Then that will be No. 20.

Q. Do you recall whether or not any time was spent examining the area where the Shaw car was before you attempted to upright the trailer?

A. Yes.

Q. And could you estimate about how much time it required for that inspection?

A. Probably about 20 minutes, I would say.

Mr. Hanson: I think that is all. [267]

Recross Examination

Q. (By Mr. Taber): Mr. Elton, how far would you say—having indicated on plaintiffs' Exhibit 20 the position of the wrecker after the collision—how far would you say the wrecker moved from the position indicated on plaintiffs' Exhibit 20 than it was prior to the collision?

A. In feet how many?

Q. Yes.

A. Well, the back end of the wrecker moved much farther than the front end.

(Testimony of Clifford Elton.)

Q. That is, the back end of the wrecker moved in a general southwest direction, did it not?

A. Yes.

Q. Sort of swinging around this way?

A. Yes.

Q. Again how far would it be from the position you have indicated where it came to rest after the collision and the position it was in prior to the collision?

A. I couldn't say.

Q. Could you give us how far approximately?

A. I would have to guess. Probably 15 or 20 feet.

Q. Would you say that the back end of the wrecker moved 15 to 20 feet in a southwest direction?

A. I would say the front end of the wrecker was approximately 15 to 20 feet west of where it was before the collision. [268]

Q. In other words, you want the jury to understand, then, that the distance between the wrecker, as you indicated, where I am now pointing as indicated where it was prior to the collision, and the position you have placed it after the collision, was 15 feet to the west?

A. Yes.

The Court: 15 to 20 did you say?

A. Yes, 15 to 20.

Q. Fifteen to 20?

A. Yes.

Mr. Taber: That's all.

(Witness excused.)

Jury admonished and recess taken at 2:45 until 3:00 o'clock.

3:00 P. M.

Presence of the jury stipulated.

Dr. Thomas K. Hood sworn and testified.

Dr. Harry B. Gilbert sworn and testified.

H. L. PAGE

the defendant, having been previously sworn, testified as follows:

Direct Examination

Q. (By Mr. Pike): Mr. Page, you previously testified that you acquired the wrecker involved in this accident during what year? A. 1941.

Q. Now between the time that you acquired the wrecker and the [269] time of the accident on December 31, 1954, had the wrecker been repainted at any time? A. Yes.

Q. And what time? A. 1951.

Q. And what was the occasion of that?

A. Gold leaf lettering on both sides of the wrecker began to sluff off and look bad and had to be repainted and relettered.

Q. At that time generally what was the condition of the blue paint? A. Good.

Q. Do you know whether or not there was any substance over the paint when you got the wrecker?

A. I didn't get the question.

(Question read.)

A. Yes, sir.

Q. What was it?

A. It was DuPont clear formation to keep the paint from sluffing off.

(Testimony of H. L. Page.)

Q. When the wrecker was repainted in 1951, was it painted a different color or colors, or the same?

A. Painted the same paint colors.

Q. And who did the repainting?

A. It was done at my shop.

Q. Were you familiar with how the paint that was used was [270] obtained? A. Yes, sir.

Q. How was that obtained?

A. The wrecker people, who painted the wrecker originally, gave me the paint number and the maker of the paint, so I could get the same paint whenever it was necessary to repaint it again. It was blue when it was painted in 1951, the same paint, made by the same people.

Q. And will you state whether or not there was any substance put over the paint after it was repainted in 1951?

A. Yes, sir, the same DuPont clear formation was put over to protect the paint and lettering, to keep it from fading.

Q. It was only repainted one time from the time you got it until the accident? A. Yes.

Q. That was in 1951? A. Yes.

Q. What was the condition of the paint after the wrecker was repainted in 1951 up to the time of the accident December, 1954? A. Good.

Q. I hand you these three photographs, which are marked defendant's Exhibit A, B, and C, and ask you if each of those photographs correctly depicts the Page wrecker as it appeared following re-

(Testimony of H. L. Page.)

painting which was done after the accident December, 1954?

A. Yes, sir. It is a little lighter in the picture.

Q. The photographs, of course, do not depict any color, only just black and white, but with that exception it shows generally the contrast in color?

A. Yes, sir.

Q. And those pictures were taken in daylight, in the vicinity of your garage at Wells, Nevada, rather recently, were they not?

A. Yes, sir.

Q. Mr. Page, when you approached the Shaw car, as it was off the north hand side of the road in the barrow pit, on the day of the accident, how long did it take you, approximately, to get the trailer righted, put back on its wheels, after you reached a conclusion as to the procedure which you were going to follow to accomplish that?

A. Five to seven minutes.

Q. And what would you have to say, by way of explanation, as to how the procedure followed by you, as being a proper procedure in that regard?

A. The wrecker——

Mr. Taber: We object. What is proper under circumstances out there on December 31, 1954, is governed by certain rules which your Honor is going to give to this jury and it is a question which they are ultimately going to decide. This question addressed to this defendant——

Mr. Pike: I will withdraw this question.

Q. What procedure did you follow, Mr. Page?

A. I followed the procedure that I was in-

(Testimony of H. L. Page.)

structed to follow by the people who built the wrecker. It is a special built wrecker, it isn't a standard wrecker, and it is also a special built truck, due to the fact that the wrecker that we built could not be mounted on any standard make of truck in the country and they had people go to school for three days' training by the engineers who built the wrecker and he taught me how to use it scientifically, and I was following those procedures in putting that trailer and car out on the road, without doing any damage to the vehicle. That was done before I arrived at the scene of the accident.

Q. Specifically, had you followed this procedure up to the point of having righted the trailer and putting it back on its wheels?

A. Yes, sir, I had.

Q. And you were in the process of uncoupling the trailer from the Shaw car at the time the car collided?

A. Yes, sir.

Mr. Taber: We will stipulate that the repair bill to the Page wrecker was the sum of \$1,040.97, but that includes \$144 tow bill from Wells to Salt Lake City.

Stipulated further that telephone calls in connection with the repair bill on the boom, \$13.18; for loss of repairs Mr. Page would have obtained, repair jobs, that sum is \$450, he would have obtained repair jobs by using the wrecker; doctor bills, \$30.50; travel to Elko, \$24.00.

Mr. Hanson: Travel to Elko was in connection with [273] doctor bill.

(Testimony of H. L. Page.)

Mr. Taber: Travel to Elko to see doctor, \$24.00; travel to Salt Lake City to get the wrecker, \$44.43, and that loss of profits from tow jobs that he would have obtained while the wrecker was being repaired is \$172.00.

We would also like the stipulation to show that parts supplied by Mr. Page for repair bill, included in the repair bill, are \$209.02. Do you have any objection to that?

Mr. Hanson: No.

Mr. Pike: There has been additional \$10.00 of Dr. Thomas Hood.

The Court: What is the total doctor bill now?

Mr. Pike: \$40.50. And also a \$31.00 x-ray.

Mr. Taber: X-rays, your Honor, \$21.50.

Mr. Pike: I think that covers special damages.

Q. Mr. Page, repairs to your wrecker were made in Salt Lake City?

A. They were made in Chattanooga, Tennessee.

Q. The wrecker itself was delivered to you originally in Chattanooga, Tennessee, wasn't it?

A. I went there and got it.

Q. After the accident December, 1954, where was your wrecker repaired so you could use it again?

A. Salt Lake City.

Q. Why was it sent to Salt Lake City?

A. There was no one over there could repair it.

Q. No one in Wells?

A. Or Elko, either one.

Q. In other words, Salt Lake City was the closest point you could have repairs made to it?

(Testimony of H. L. Page.)

A. Yes, sir.

Mr. Pike: That is all.

Cross Examination

Q. (By Mr. Wright): Mr. Page, I think you said you put your wrecker out on the highway pursuant to instructions given to you by the people who built the trailer? A. No, the wrecker.

Q. Built the wrecker; and that was pursuant to those instructions given to you at the time?

A. Proper procedure for doing a good job under the conditions that existed.

Q. When did you get the wrecker? A. 1941.

Q. In 1941, and December 31, 1954, the day of the accident, I understand you were following the same instructions as you got in 1941?

A. Exactly.

Q. Isn't it possible to have taken—first, I might ask you, you did drive up from Wells and you did stop on the shoulder somewhere in the vicinity of that trailer, did you not, pointing toward Elko?

A. That's right.

Q. This trailer that was attached to the Ford was very small, wasn't it?

A. Small trailer, about seven or eight feet long.

Q. But it was a small load?

A. About 36 inches high on the side, I think it was.

Q. About how much did it weigh with the load on?

A. Well, I don't know. The man himself that

(Testimony of H. L. Page.)

owned the trailer said he had about 1500 pounds on it.

Q. Did he say that was 800 pounds and the other a thousand?

A. Well, I asked how much a load it had on it and he said about 1500 pounds.

Q. This equipment that you had, you had power brakes, you could put on around three thousand pounds on all the different wheels? A. Yes.

Q. And then at times you even used it to tow great big semi-jobs, like these big companies?

A. Yes, sir.

Q. And you used it to pull cars from way down off the highway where it went down considerable distances? A. Yes.

Q. You had the ability to pull cars up from where they had gone over an embankment a considerable distance?

A. You mean with the wrecker?

Q. Yes, with the wrecker. [276]

A. With the boom driven or just the wrecker itself?

Q. With the winch up? A. Oh, yes.

Q. Now this little trailer that was tipped over on its right side, it didn't take very much of a pull to pull that up on the wheels, did it?

A. It took very little pull.

Q. Did you have the engine running when you did that? A. Sure.

Q. To get power on the boom lines? A. Yes.

Q. It wouldn't be similar to a job, some big

(Testimony of H. L. Page.)

semi-trailers like the PIE, wouldn't take that much?

A. No, the procedure would be entirely different.

Q. Now, isn't it possible that you could have put the wrecker on the shoulder, facing to the west, and put the boom and placed similar to that, hooked on to the trailer, tighten up your winch and thus pulled the trailer right up over on its wheels?

A. That would have been a possibility. It could have been done, provided you had carried out the other procedure.

Q. Well, the first thing you had to do was to put the trailer on its wheels? A. That is right.

Q. And you did park over on the shoulder when you drove up there, didn't you? [277]

A. That's right.

Q. Now as to pulling this little trailer back on the road, you could very easily have attached on the back end, with the front end of the wrecker facing toward Wells, with the booms swinging over and go right up on the highway towards Wells, couldn't you? A. No.

Q. And that was a very small vehicle, that trailer?

A. You must take into consideration the trailer was on its side.

Q. I mean after you put it on its wheels.

A. I didn't put it back on the bank.

Q. Did you put it on its wheels? A. Yes.

Q. You could have driven down to the west up where you turned around when you came back? You did turn around and come back? A. No.

(Testimony of H. L. Page.)

Q. How did you get the wrecker out of the highway? A. Turned around.

Q. On the road itself? A. Yes.

Q. You could have first put the trailer on its wheels and stayed over on the shoulder, couldn't you?

A. I could by running a cable, taking the other boom and swinging it in the opposite direction and putting at an angle and turned the wrecker there, but I would have created a hazard of cable going clear across the highway to the south. [278]

Q. Don't you have any braces on your wrecker, when you are parked parallel to the road and want to hold something off from the barrow pit, don't you have any braces that go on the shoulder up to that side of that cab?

A. In the first place, there is no wrecker built like that.

Q. I was asking you.

A. You are saying something that never existed.

Q. Don't you have, with your equipment, some braces to put from the ground up to the side of your wrecker?

A. I have an extension of the mast on both sides that goes down to the surface of the road. They are good up to a certain point of pull, that is to take the strain off of the frame of the wrecker. That is what they are for.

Q. In other words, you have some braces there used in connection with your wrecker, so that your wrecker itself, if you are pulling from the side,

(Testimony of H. L. Page.)

will not tip over? You would put some braces up so it will take the strain off?

A. The wrecker has two movements.

Mr. Pike: Let the record show Mr. Wright has handed to Mr. Page a toy wrecker and when you are talking about the Page wrecker, make that clear and when you are talking about this toy wrecker with one boom, make that clear.

A. The page wrecker has a mast—called a mast—steel mast that sets up here, with cross pieces on the top and braces in between like this to make it rigid, to keep it from twisting. It also [279] has braces coming from the top of the mast going across the top down to the back of the wrecker, clear forward to the boom, two of them, one on each side. They come to a point in back up this way, to keep it from twisting as much as possible, and this mast sits up in this position on the Page wrecker, is fastened to the frame and directly underneath at the bottom of the mast on each side there is a continuation with a steel plate about 10 inches in diameter, and it is on a ratchet that you can lower down when you are pulling something heavy or lifting something heavy, let it down, clear down to the highway. Comes right in underneath on both sides, to take the strain off of the mast itself, to keep it in alignment, but it is directly beneath the mast and inside of the frame of the truck. It is narrower than the frame itself, because the mast is mounted inside the frame, so it is quite narrow underneath. They are put there for the purpose of taking the

(Testimony of H. L. Page.)

strain off of the truck frame when pulling a heavy load from back or when necessity demands and you have a heavy piece of equipment on a mountainside in a canyon and it is necessary to block the highway temporarily, and you swing one boom around to the side. They can only go 180 degrees, those booms, that is all they can move, 180 degrees. You can swing a boom around here, let this brace down underneath the truck continuation of the mast on both sides. That makes the frame solid. There is no strain on the frame, it is all on the mast; and you take the other boom and swing it around in the opposite direction [280] and anchored. If the vehicle you are going to pull up is heavy, you have to put a block in the pull line. It has a three-eighths inch specially built cable, very flexible. If necessary you put one block or two blocks on the line you are going to pull the vehicle back up on the road with. The same thing applies for the pull line, because the pull line is no stronger than the anchor line. If you ran a straight cable back and anchored it, you have one block or two blocks on the pull line, the result would be you would break your anchor line and over would go your wrecker down in the canyon, or wherever you might be setting, and the same probably applies to the operation of that vehicle over there. I would have had to swing one boom around and with 1500 lift—those booms are 12 feet long—this other boom would have been just hanging over here. I would have had to go around in the opposite direction for

(Testimony of H. L. Page.)

safe position and put a cable across the highway. I have anchors, ground anchors, that I can pull up to 64 ton against it, anchor them right to the ground. I would have to swing it around and put my ground anchors out in order to have made it a safe operation in raising that kind of weight. I can raise a thousand pounds without putting an anchor and an anchor cable out or without turning the wrecker over. Anything over that, it can't be done, because your anchor pulls together, it will tip over, and that is why it would have been wrong procedure. To have righted the trailer by pulling up by the side of it, it would [281] have taken three or four times the length of time to have done the job that way, as it would the way I proceeded. I had already righted the trailer, the trailer was back up in that position. The wrecker was back up, back of the trailer, with these booms extending out approximately two feet beyond the back of the wrecker, which were over the trailer. I had raised the trailer, took the cable from the left boom of the wrecker, I took the cable from this boom here, and put it down to the lower side. It was turned over on its right, and put it back up on its wheels, but you couldn't pull it out that way, it would turn over again, so it was necessary to take the cable from the right boom and put the upper side of the trailer, the opposite side, and take the cable from the left boom to hold the trailer up, the wheels clear off the ground, in a level position, and use the two cables in moving the wrecker for-

(Testimony of H. L. Page.)

ward. I could have pulled the trailer right back on to the highway in an upright position that it wouldn't have turned over, and that is the only way to get it back on the highway.

Q. Mr. Page, after you hooked on to the little trailer and you put it on its wheels, then you took the cable that you had attached to the little trailer and it was taken off, wasn't that right?

A. Just merely unhooked from a chain.

Q. And then the fellows were unhooking the little trailer from the car after it was on its wheels?

A. That is right.

Q. You weren't there when the Ford and trailer and DeSoto were taken off the place where they set after the accident? A. No.

Q. Now, Mr. Page, page 60 at line 1, I ask you if you didn't testify in the former action as follows. This is cross-examination by Mr. Wright: "Mr. Page, the first thing that you had to do was to put the trailer back upon its wheels, didn't you?

A. Yes. Q. So you wouldn't be pulling the trailer until after it was on its wheels? A. That is right.

"Q. Couldn't you have taken your wrecker, placed it with the front end headed westward, run your cable back to the trailer that was tipped over on the side, hooked on to this corner and tightened the winch and tipped it over on its wheels? A. Could have, yes. It would have been possible." Now didn't you so testify?

A. I just got through testifying to the same thing.

(Testimony of H. L. Page.)

Redirect Examination

Q. (By Mr. Pike): Would that have been a safe and proper way of doing it?

A. No sir. [283]

Jury admonished and recess taken at 4:45 P.M.

Tuesday, November 15, 1955

10:00 A.M.

Presence of the jury stipulated.

The Court: At the conclusion of our afternoon hearing yesterday, the plaintiffs had rested their case, is that correct?

Mr. Wright: Yes, plaintiffs had rested.

MR. PAGE

resumed the witness stand on further

Redirect Examination

Q. (By Mr. Pike): Mr. Page, after your tow car was damaged in the accident of December 31, 1954, did one of the front doors of the cab either remain in your possession or come back into your possession following the accident?

A. Yes sir.

Q. And which door of the cab on the tow car was it? A. The left door.

Q. Where did you keep that door?

A. It was kept in the garage until the crank that wound up the glass was removed and then it was thrown out back in the junk pile.

Q. Did you advise me yesterday of the fact that you had that door? A. Yes sir.

(Testimony of H. L. Page.)

Q. And thereafter, at my request, did you ask by telephone that the door be sent down here to Reno? A. Yes sir. [284]

Q. Now have you changed the condition of that door in any way since the accident, so far as the color of the paint or anything of that nature is concerned? A. No sir.

Q. And the door is in a damaged condition. What is the reason it appears to be in a damaged condition?

A. Due to the collision with the car and the wrecker.

Q. Since arriving at the courthouse this morning, have you seen the particular door, concerning which you have just given testimony?

A. Yes sir.

Q. I will ask you whether or not that door is now in substantially the same condition that it was when it was removed from the Page tow car, following the accident referred to?

A. Yes sir, outside of being out in the weather in the scrap pile. Scratches might be on it.

Q. With that exception, though, it is substantially in the same condition as it was, so far as color is concerned, prior to the accident?

A. Yes sir.

Q. And at the time of its removal, it was damaged, is that correct? A. Yes sir.

Mr. Pike: We ask that be marked next in order.

Mr. Taber: We will stipulate that may be [285]

(Testimony of H. L. Page.)

marked and admitted in evidence as defendant's next in order.

The Court: Defendant's E.

Q. Mr. Page, is this door that is in the court room now and just been marked defendant's Exhibit E in the case, the door from the Page wrecker, concerning which you testified? A. Yes sir.

Q. How old are you, Mr. Page?

A. Fifty-six.

Mr. Pike: That's all.

Mr. Wright: We have no questions.

(Witness excused.)

The Court: Have you anything further?

Mr. Pike: Nothing further in the way of evidence to be offered on behalf of Mr. Page, your Honor, but there is a certain motion we would like to make in the absence of the jury.

The Court: You have submitted all your evidence?

Mr. Pike: That is right.

The Court: Rested your case?

Mr. Pike: Yes.

The Court: Any rebuttal?

Mr. Wright: No rebuttal.

The Court: Let the record show defendant has rested his case and there is no rebuttal on the part of plaintiffs.

Jury admonished and excused at 10.20 A.M. [286]

Motions for directed verdict on part of respective counsel argued and denied.

Motion by Mr. Taber to strike answer of defendant Page that the wrecker he was operating was an emergency vehicle argued and denied.

Recess taken at 10:30.

11:30 A.M.

In Chambers

The Court: Let the record show that the Court and counsel are meeting in chambers, for the purpose of settling, allowing and taking exceptions to instructions, under Rule 51, and it is stipulated by counsel that this matter could be disposed of in chambers, in lieu of being in open court.

The plaintiffs have presented to the Court a set of instructions, part of which the Court has approved and taken, 12 in number, some of these with modifications, and has particularly taken plaintiffs' instructions Nos. 14, 15, 16, 18, 20, 21, 27, 28, 29, 32, 34, and 34(a).

The defendant submitted to the Court certain numbered instructions, from which the Court took and approved instructions Nos. 5, 11, 17, 18 and 20.

The Court has prepared instructions additional to those which it has taken from the plaintiffs' and defendant's offered instructions, and these, incorporated with plaintiffs' and defendant's instructions, cover instructions numbered 1 to and [287] including 51, with the exception of Instruction No. 8, which was deleted, therefore the total instructions are 50. Court and counsel have gone over these instructions together and they have like numbered sets.

The plaintiffs may now call the Court's attention to any exceptions and objections they may have to the Court's instructions numbered 1 to 51.

Mr. Wright: If the Court please, the plaintiffs wish to take exception to No. 12. This instruction deals with the general subject of the duty to look, see objects clearly visible. Under the circumstances, we think it should not be given, because of the ice, passing the truck, the blending of the wrecker with the highway, and it is not applicable. In this connection, if this instruction is given, we believe we have an instruction prepared to define what is clearly visible, that whether an object is clearly visible depends on all of the surrounding circumstances. There isn't anything to show what is defined as clearly visible. Some people might think standing on the highway means clearly visible and looking up when that person is driving down the road. Under those same circumstances, the test is whether or not the object is clearly visible. We would ask at least that modification.

The Court: The exceptions will be noted.

Mr. Wright: If the Court please, with reference to Instruction No. 32, we wish to have the plaintiffs except to the [288] instruction, by Jennie Duff, the plaintiff, and Elizabeth Bronson, the plaintiff and we wish to severally, and not jointly, on their behalf, and the elements that are missing are these: At the end of the sentence it says: " * * * they were also under a duty to warn or notify the said John Duff of the presence of said tow truck upon the

highway, if the danger of the collision was or should have been apparent." We object to that specifically on this ground, that a duty of a passenger is not to warn when they see an object on the road, because Duff may have seen it, and it is only where the passenger realizes, or should realize, that John Duff was not seeing it, and does not cover that element. The same instruction: "Failure to perform the foregoing duty, if any, by either of the plaintiffs, Jennie Duff or Elizabeth Bronson, would constitute negligence on the part of these plaintiffs or either of them." Under that instruction, suppose Elizabeth Bronson was not negligent in warning, the other person was asleep, or seemed asleep in the back seat, under this instruction the failure to perform the duty, if any, by either of the plaintiffs would constitute negligence on part of the plaintiffs. You are to impute negligence of Elizabeth Bronson to Jennie Duff, and you cannot do it.

The Court: Following exceptions taken by counsel for the plaintiffs to Instruction 32, the last sentence of that instruction, has been amended to conform with the exceptions and will be so given. [289]

Mr. Wright: May I also call attention of the Court that we claim the error of the preceding sentence has not been cured; in other words, it is defective, that not only must the passenger see, or should have seen, but they must realize, or should have realized, that John Duff was not aware of the apparent danger, and fails to cover that feature.

Now I think with the rest of the instructions we

have no objections. We have some to offer in our behalf.

The Court: Plaintiffs have no further exceptions or objections to the remainder of the instructions allowed by the Court, but does have certain instructions which they desire to offer, in addition to those allowed.

Mr. Wright: Yes, if the Court please. That is all the exceptions.

The Court: For the purpose of identifying the plaintiffs' instructions now being offered, they are numbered in the following manner: A, B, C, etc. Let the record show that plaintiffs have offered certain instructions, with request that they be given, these instructions being lettered A to M, for the purpose of the offer. The Court is of the opinion that these offered instructions are included in those approved by the Court and are covered, or that they do not constitute the law applicable to this case and the evidence. [290]

Mr. Hanson: Comes now the defendant and takes exception to the Court's Instruction No. 23, the whole and each part thereof, on the ground and for the reason that the evidence conclusively shows, as a matter of law, that if the plaintiff, John Duff, was placed in emergency created by sudden peril, such emergency resulted from his own negligence, and under the undisputed evidence in this case as to the distance the collision was from the crest of the hill immediately to the east, the undisputed evidence on visibility, this instruction should not be

given, because it will tend to mislead and confuse the jury.

Defendant excepts to the second paragraph of the Court's Instruction No. 25, upon the ground and for the reason that the evidence shows conclusively, as a matter of law, that the circumstances existing at the time of said accident, it was not necessary for the defendant Page, in the exercise of ordinary care, to put out flares, station a flagman, or to have any other warning, other than what the evidence showed existed at the time of said accident.

Also that the defendant takes exception specifically to the words "other warnings", on the ground that they are too general and leading the jury to speculate as to warning there might be required to give under the circumstances. The defendant contends that, as a matter of law, the defendant was not negligent in not taking any of the steps mentioned in the second part of this instruction, that his failure to do so, as a matter [291] of law, was not a proximate cause of this collision, and the giving of said instruction, second paragraph, would tend to mislead and confuse the jury, and the law as stated there is not applicable to the facts as adduced by the evidence in this case.

Defendant excepts to the Court's Instruction No. 26, on the grounds and for the reason defendant's evidence is undisputed that defendant Page not only had a right to park his wrecker in the place it was parked, where the accident occurred, but that such procedure was necessary for efficient, quick operation involved in getting the Shaw car clear

back on the highway; that there is no issue and no evidence adduced in the case that Page parked his wrecker truck on the highway in such a manner as to occupy more than would reasonably be necessary under the circumstances and also under the evidence and as a matter of law, it was conclusive that the visibility was unlimited and that it was unnecessary for the defendant, Page, to have had flags or guards or other practical means. Defendants except to the words "other practical means" because they are too general and permit the jury to stipulate as to anything the defendant might have done under the circumstances. Defendant contends again that, as a matter of law, the failure to have flags or cards or other practical warnings could not have been the proximate cause of this accident, under all the evidence.

Defendant excepts to the second paragraph of Court's Instruction No. 28, wherein the jury are told that the speed [292] at which a vehicle travels upon the highway, considered as an isolated fact at so many miles an hour, is not proof either of negligence or of the exercise of ordinary care, upon the grounds that said part of the instruction is not a correct statement of law, and as to said part of said instruction, would tend to mislead and confuse the jury, and does not correctly state the law.

Defendant excepts to the Court's Instruction No. 29, upon the ground it is not a correct statement of the law, inasmuch as the evidence is undisputed that John A. Duff and Jennie R. Duff are residents of the State of Idaho and that the automobile which

they were driving was community property, that the negligence of the plaintiff, John A. Duff, is imputed to the plaintiff Jennie R. Duff. Defendant does not except to the last part of the instruction: "or to the plaintiff, Elizabeth Bronson."

Comes now the defendant and also excepts to the Court's failure to give their requested Instructions Nos. 1, 2, 3, and 4, separately as well as jointly, upon the grounds and for the reasons mentioned in the motion for a directed verdict made at the close of the evidence.

Defendant excepts to the Court's refusal to give defendant's requested Instruction No. 8(b), which stated in fact that inasmuch as two of the plaintiffs in the action, John A. Duff and Jennie R. Duff, are husband and wife, if the jury should find that Mr. Duff was negligent and such negligence [293] was the proximate cause of the accident, then Mrs. Duff can not recover. Such statement is merely a quote in the substance of the request.

Defendant excepts to the Court's refusal to give defendant's requested Instruction No. 11, that it was the duty of the plaintiff, John A. Duff, to keep a reasonable lookout for vehicles on the highway, that he was required, as a matter of law, to see what could have been seen, and if he did not see the defendant's wrecker at a time when he should have seen it, in the exercise of reasonable care, then he was negligent and such negligence was the sole and proximate cause of the accident and plaintiffs can not recover, upon the grounds and for the reason that said instruction contained a correct statement

of the law as applicable to the evidence adduced in this case.

Defendant excepts to the refusal of the Court to give defendant's Instruction 12 as requested, for the same reason, that said instruction contains a correct statement of law applicable to the case.

Defendant excepts to the Court's refusal to give defendant's Instruction No. 13, on the grounds and for the reason it is a correct statement of law.

The Court: In connection with the objections on the part of the defendant to the failure of the Court to give certain numbered instructions, the Court has refused these instructions for the reason [294] that it is of the opinion that, without going into detail as to each separate instruction, that they are not applicable to the facts of this case, as adduced by the evidence, that they do not state the law of the case as shown to be applicable by the evidence, and finally that the instructions have been covered in other instructions by the Court.

Mr. Wright: If the Court please, may I have the record show that in the offer of the instructions of A to M inclusive that each of the plaintiffs severally request each and every one of the instructions from A to M inclusive.

The Court: The record will so show. Gentlemen, the Court has prepared suggested forms of verdict. There are three plaintiffs and a counterclaimant, which permits four affirmative or four negative verdicts to be returned. I present these forms of verdict to you, eight in number, and it is my under-

standing that counsel stipulate that these are proper forms.

Mr. Wright: So stipulated.

Mr. Pike: So stipulated.

The Court: It is stipulated at this time that Exhibit 20 on the part of the plaintiffs, consisting of the blackboard and the drawings thereon, will be [295] photographed and the photograph will be considered as plaintiffs' Exhibit 20 in the case.

Mr. Wright: So stipulated.

Mr. Hanson: So stipulated.

3:55 p.m.

Presence of the jury stipulated.

INSTRUCTIONS OF THE COURT

Instruction No. 1

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law covering your deliberations in this trial.

Upon all questions of law, it is your duty to be guided by the instructions of the Court and to accept the law as given to you by the Court. You are, however, the sole and exclusive judges of all questions of fact and of the weight and effect of the evidence and of the credibility of the witnesses.

Your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in accordance with the rules of evidence.

You must not consider for any purpose any testi-

mony which has, by the order of the Court, been stricken out. Such testimony is to be treated as though you had never heard it.

You should disregard statements, if any, made by the attorneys not supported by the evidence. However, any facts [296] stipulated to by counsel may be treated by you as facts proven in the trial.

You must weigh and consider the case now being tried by you without regard to sympathy, prejudice or passion for or against any party in this case.

Instruction No. 2

There are certain general principles of law to which the Court desires to call your attention.

You will understand that under our system the Court and the jury have a divided responsibility. It is the duty of the Court to decide all questions of law which may arise during the progress of the trial, and the duty of the jury to pass upon the facts. If the Court is unfortunate enough to make a mistake in deciding those questions of law, there is another court which may be appealed to, to correct these mistakes. It is, therefore, the duty of the jury to take the law as laid down by the Court, because if the jury should undertake to determine what the law is, and should make a mistake, there is no way of remedying it. It is the province of the jury to pass upon the facts of the case, upon the credibility of the witnesses, and to apply the law to the facts of the case as they find the facts to be. The Court is just as little inclined to interfere with the province of the jury passing upon the facts of the case,

as it is sensitive about having the jury undertake to determine what is the law of the case. With this understanding of our [297] respective duties, the Court states to you the following general principles.

Instruction No. 3

In civil cases, and this case is a civil case, the affirmative of issues must be proved by a preponderance of the evidence. The affirmative here is upon the plaintiffs as to all of the affirmative allegations of their complaint, which have not been admitted by the defendant, and upon the defendant as to any of the affirmative allegations of his answer or of his counterclaim. The burden of proof, therefore, rests upon the parties making such affirmative allegations which are not admitted by the opposing parties.

If the evidence is contradictory, your decision must be in accordance with the preponderance of the evidence. It is your duty, if possible, to reconcile such contradictions so as to make the evidence unveil the truth. When the evidence, in your judgment, is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the parties upon which rest the burden of proof.

Instruction No. 4

The jury is the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified at this trial. There are some standards or rules by

which you can measure the testimony [298] of a witness and evaluate it and determine whether or not you want to believe it or how much of it you want to believe.

The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility and determining whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand and may consider their relation to the case, if any, and also their degree of intelligence.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, his bias or prejudice, if any, by the character of his testimony, or by contradictory evidence.

A witness may be impeached by contradictory evidence or by evidence that on some former occasion he made statements or conducted himself in a manner inconsistent with his present testimony as to any material matters to the cause on trial.

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his testimony is completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness wilfully false in one material part of his testimony is to be distrusted in others. The jury may reject [299] the whole of the testimony of a witness who has wilfully sworn falsely as to a mate-

rial point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully with the design to deceive, then you may treat all of his testimony with distrust and suspicion, and reject all, unless you shall be convinced that he has in other parts sworn to the truth. You may also consider the manner in which a witness may be affected by the results of your verdict. You may also consider the extent to which he has been corroborated or contradicted by other evidence. Of course, any matter in general which you contend reasonably sheds light upon the credibility of the witness may be considered by you.

Instruction No. 5

The rules of evidence ordinarily do not permit the opinion of a witness to be received in evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience, has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matters in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it.

You are not bound by such an opinion. Give it the weight to which you deem it entitled whether that be great or [300] slight, and you may reject it if, in your judgment, the reasons given for it are unsound.

Instructions No. 5(a)

A doctor is permitted to testify concerning statements made to him by a patient in connection with his efforts to learn the patient's history and condition for purposes of diagnosis and treatment. Such evidence is received and may be considered for only the limited purpose of showing the information upon which the doctor based his opinions. The statements so repeated by the doctor may not be regarded as evidence of their own truth. However, if it appears that a person made a statement to a doctor which was in conflict with that person's testimony in court, that inconsistency may be considered in determining the credibility of the witness.

Instruction No. 6

By a preponderance of evidence is meant such evidence as when weighed with that opposed to it has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.

"Preponderance of evidence" does not mean the greater number of witnesses, but the greater weight, probability, quality and convincing effect of the evidence and proof offered by the party holding the affirmative as compared with the opposing evidence. [301]

Instruction No. 7

While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegation by a preponderance of the evidence, this rule does not require demon-

stration, that is, such degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible.

In a civil action such as the one we are now trying, it is proper to find that a party has succeeded in carrying his burden of proof on an issue of fact, if the evidence favoring his side of the question is more convincing than that tending to support the contrary side, and if it causes the jurors to believe that on that issue, the probability of truth favors that party.

Instruction No. 8

The burden rests upon each party to prove by a preponderance of the evidence the elements of his or her damage, if any. The mere fact that an accident happened, considered alone, would not support a verdict for any particular sum.

Instruction No. 10

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human [302] affairs. It is the failure to use ordinary care in the management of one's property or person.

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in the given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

Instruction No. 11

Ordinary care as used in these instructions is the care that ordinary prudent persons exercise under the same or similar circumstances, in a matter concerning their own business, and the failure upon the part of a person to exercise such care is negligence.

Instruction No. 12

General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive.

Instruction No. 13

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

Instruction No. 14

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

Instruction No. 15

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.

Instruction No. 16

This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstances, of the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause [304] of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

Instruction No. 17

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are part of, the conduct in question. An act negligent under one set of conditions might not be so under another. Therefore, we ask: "What conduct might reasonably have been

expected of a person of ordinary prudence under the same circumstances?" Our answer to that question gives us a criterion by which to determine whether or not the evidence before us proves negligence.

Instruction No. 18

The law forbids you to attempt to classify negligence into degrees or grades or kinds, or to compare one instance of negligence with another and judge which is more deserving of reproof or excuse. If you should find that there was negligent conduct on the part of more than one person, you are not to attempt to determine which was guilty of the greater negligence, [305] with a view to delivering a verdict in favor of, or to favor in any way, the one whose conduct was the less reprehensible.

Instruction No. 19

When it appears that the conduct of two or more persons, acting independently and at different times, created or contributed to the circumstances out of which injury resulted, the question of proximate or remote cause requires the jury to consider thoughtfully the relationship between the conduct of one person, whom, for convenience, I shall call the original actor; the conduct of another, whom I shall call the secondary actor; and the sequence of events leading to the injury.

Of course, the first question to be answered is whether or not the defendant was negligent. If he was not, then he may not be held liable even if his conduct was a proximate cause of the accident. If

the defendant was negligent, then you must determine what the effect of that negligence was and whether or not that effect was extended, enhanced, broken or changed by an efficient intervening cause. Was the conduct of a secondary actor, who is not a defendant in this case, an intervening agency, which brought defendant's conduct into proximate causal relationship to the injury? Or was that later conduct the sole proximate cause? The test is this: If the defendant foresaw, or by exercising ordinary care would have foreseen, the probability of the conduct of the secondary actor and [306] the probability that defendant's conduct plus the secondary conduct would result in injury to a third person, then the conduct of the defendant was a proximate cause of the injury. But if the probable result was not thus foreseen or foreseeable by the defendant, then he may not be held liable.

Instruction No. 20

Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

Instruction No. 21

In order that any of the parties recover, it is not necessary that he or she prove all of the grounds of negligence alleged in the complaint or counterclaim; any party may recover if you find that the

other was negligent and that said negligence contributed in some degree, as a proximate cause, to the injuries of such party and the party was not guilty of contributory negligence.

Instruction No. 22

In the action of Duff vs. Page, Mr. Page claims that Mr. Duff was guilty of contributory negligence. Likewise, in the counterclaim of Page vs. Duff, Mr. Duff claims that Mr. Page [307] was guilty of contributory negligence. In order to prove the defense of contributory negligence, the burden is on the one who asserts it to prove two things, (1) negligence, and (2) that such negligence was a proximate cause of the injuries suffered. If the defendant Page fails to prove either of these things, then the defense of contributory negligence falls. Likewise, if the counter defendant Duff fails to prove either of these things, his defense of contributory negligence fails.

Instruction No. 23

A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the care that an ordinary prudent person would exercise in the same situation. If at that moment he does what appears to him to be the

best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer.

Instruction No. 24

It is the duty of every person using a public highway, whether a pedestrian or the driver of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision.

Instruction No. 25

You are instructed that even though the defendant, H. L. Page, had a right to park his truck on the main traveled portion of the highway, yet he was required to use ordinary care in warning others that might be reasonably expected to use the highway of the presence of such truck.

If you find that at the time and place of the accident a person of ordinary prudence would have put out flares, a flagman or other warning to warn of the presence of the defendant's truck on the main traveled portion of the highway, then you are instructed that the failure to put out flares, flagman or other warning was negligence.

Instruction No. 26

You are instructed that the operator of a wrecker truck being used to restore a wrecked vehicle to the highway, may park the wrecker on the main trav-

eled portion of a public highway for a reasonable length of time, under the following conditions:

1. That it is necessary to park the wrecker truck on [309] the main traveled portion of the highway.

2. That the wrecker truck must not occupy more of the highway than is reasonably necessary under the circumstances.

3. And that approaching traffic must be fully warned of the obstruction by lights, flags, guards or other practical means in the event the circumstances are such that an ordinarily prudent person would give such warning by any of the means suggested.

Instruction No. 27

A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another.

Instruction No. 28

You are instructed that Section 4350 of the Nevada Compiled Laws, provides as follows:

“It shall be unlawful for any person or persons to drive or operate a vehicle of any kind or character in a reckless manner on any street or highway in this state; or in any other than a careful or prudent manner; or at a rate of speed greater than is reasonable and proper, having due regard for the traffic, surface and width of the highway; or at such

a rate of speed as to endanger the life, limb or property of any [310] person.”

The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care.

Whether that rate of speed is a negligent one is a question of fact, the answer to which depends on all of the surrounding circumstances.

Instruction No. 29

You are instructed that the negligence, if any, of John A. Duff cannot be imputed to the plaintiff, Jennie R. Duff, or to the plaintiff, Elizabeth Bronson.

Instruction No. 30

While the amount of any verdict you may decide to return in favor of any party in this case is left to your sound discretion, your award in each instance must be just and reasonable and must be based exclusively upon the evidence introduced and these instructions. The law does not prescribe any definite standard by which to compensate an injured person for any pain, discomfort and anxiety suffered by him or her, nor does it require that any witness should have expressed an opinion as to the amount of damages that would compensate for such injury. The law does require, however, that when making an award for pain, discomfort and anxiety, the jury must exercise its authority with calm and reasonable judgment, and that the damages [311] awarded shall be just and reasonable and shall not exceed the amount prayed for in the complaint.

Instruction No. 31

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

Instruction No. 32

You are instructed that the plaintiffs, Jennie Duff and Elizabeth Bronson, were passengers in the automobile driven by the plaintiff, John Duff, when said accident occurred; that as passengers, they had no right to control the manner in which the plaintiff, John Duff, was operating the vehicle at said time and place, and if you find that he was negligent as defined in these instructions, such negligence, if any, is not imputable to the plaintiffs, Jennie Duff and Elizabeth Bronson. However, you are further instructed that the plaintiffs, Jennie Duff and Elizabeth Bronson, as passengers in said automobile, were under a duty to exercise reasonable care for their own safety, and if you find from the evidence that they knew, or [312] under the circumstances should have known, that the plaintiff, John Duff, was driving said vehicle in a negligent or careless manner, then it became the duty of said plaintiffs to protest the manner in which he was operating said vehicle, and if they saw or under the circum-

stances should have seen the defendant's tow truck, they were also under a duty to warn or notify the said John Duff of the presence of said tow truck upon the highway, if the danger of the collision was or should have been apparent. Failure to perform the foregoing duty, if any, by either of the plaintiffs, Jennie Duff or Elizabeth Bronson, would constitute negligence on the part of the plaintiff failing in said duty, and if you find that such negligence, if any, was a proximate contributing cause of said accident or injuries sustained by these plaintiffs, then they cannot recover damages against the defendant, Page.

Instruction No. 33

The plaintiff, John A. Duff, seeks recovery for the following items of damages:

1. General damages for injuries received by John A. Duff in the sum of \$10,000.00.
2. Elko Clinic, medical treatment \$80.00.
3. Elko County General Hospital, hospital treatment \$215.60.
4. One pair of glasses \$46.00.
5. Dr. Charles A. Terhune, medical treatment \$10.00. [313]
6. One-third ($\frac{1}{3}$) ambulance charge to Elko, Nevada \$11.66.
7. Loss of services of Mrs. Jennie R. Duff \$2,000.00.
8. Damages to 1955 DeSoto Sedan \$2,059.57.
9. Towing automobile, scene of accident to Burley, Idaho \$85.07.
- Total \$14,507.90.

Instruction No. 34

The plaintiff, Jennie R. Duff, seeks recovery for the following items of damages:

- (1) Elko Clinic, medical treatment \$334.50.
 - (2) Elko County General Hospital, hospital treatment \$431.05.
 - (3) One-third ($\frac{1}{3}$) of ambulance—scene of accident to Elko \$11.67.
 - (4) Air Ambulance, Elko to Burley \$70.00.
 - (5) Dr. C. R. Kern, Jr., Anesthetist, Elko \$15.00.
 - (6) Dr. C. M. & E. H. Elmore, eye treatment \$12.00.
 - (7) Dr. C. W. Keen, optometrist \$9.00.
 - (8) Back brace \$90.00.
 - (9) Trip—Burley to Boise for back brace—350 miles at 9c per mile \$26.00.
 - (10) Drugs and medicines \$56.50.
 - (11) Nursing and housekeeper \$205.50.
 - (12) Cottage Hospital, Burley, Idaho, for X-rays \$77.50.
 - (13) Dr. Chas. A. Terhune, Burley, Idaho \$250.00. [314]
 - (14) General Damages \$50,000.00.
- Total \$51,588.72.

Instruction No. 35

The plaintiff, Elizabeth Bronson, seeks recovery for the following damages:

1. Elko Clinic, medical treatment \$217.00.
2. Elko County General Hospital, hospital treatment \$393.95.
3. H. B. Grover, M.D., Vallejo, Calif. \$10.00.

4. Dr. Lee, Vallejo, California \$3.00.
5. Drs. Butler & Ritter \$25.00.
6. One-third ($\frac{1}{3}$) ambulance—scene of accident to Elko \$11.67.
7. Travel expenses—Elko to Berkeley, train fare and Pullman \$22.04.
8. Automobile, Berkeley to Menitia \$5.00.
9. Meals on train \$1.50.
10. Mrs. Alameda Nielsen, nurse attendance on trip—Elko to Berkeley—Railroad fare \$52.05.
11. Betty Joe Bronson—2 days nursing \$20.00.
13. Loss of earnings—January 13, 1955 to date of trial—42 weeks @ \$15.00 per week \$630.00.
14. Dr. Brockbank \$342.50.
15. General damages \$25,000.00.
- Total \$26,793.71. [315]

Instruction No. 36

If you find that the plaintiff, John A. Duff, is entitled to recover damages by this action, you shall award him a sum that will compensate him reasonably for any loss of his wife's services that he has suffered, or is reasonably certain to suffer in the future, as a proximate result of the accident in question, but not to exceed \$2,000.00.

In determining that amount, should you decide so to do, your object shall be to fix the pecuniary value of the services thus lost. To that end, you should consider, as shown by the evidence, the character and conditions of the home wherein plaintiffs, John A. Duff and Jennie R. Duff, his wife, have dwelled; the services, if any, that have been performed by

the wife in the management of the household and the performance of household duties.

The plaintiff, John A. Duff, also seeks to recover damages to his 1955 DeSoto Sedan automobile.

In fixing the damages to a vehicle, you shall allow said plaintiff such sum as well reasonably compensate said plaintiff for damage to said property. The sum is equal to the difference in the fair market value of the property immediately before and after the injury; provided, however, that if the vehicle has been repaired, so as to restore the fair market value as it existed immediately before the injury, at an expense less than such difference in value, then the measure of damage is the expense of such repair, rather than such [316] difference in value.

The plaintiff, John A. Duff, also seeks recovery of damages for his own personal injuries, which items of damage are outlined in other instructions.

Instruction No. 37

You are instructed that in the event you find in favor of the defendant and counterclaim, H. L. Page, and against the plaintiff, John Duff, on the defendant Page's counterclaim, you shall award to the defendant and counterclaimant Page such amount as you find from a preponderance of the evidence he is entitled to receive in connection with the following items:

First: The reasonable value of the medical and doctor expenses, not exceeding the sum of \$62.00.

Second: The reasonable value of the cost of re-

pairing said tow truck, not to exceed the sum of \$1,040.97, and the reasonable value of the loss of use of said vehicle while the same was being repaired, not to exceed the sum of \$622.00, and miscellaneous expense in the sum of \$91.61.

Third: Such sum as general damages, not exceeding the amount of \$20,000.00, as will reasonably compensate the defendant, Page, for the pain, discomfort, distress and disability suffered by him proximately resulting from the injuries complained of, and such discomfort, distress and disability which he will continue to suffer in the future, if any. In determining this amount, you should take into consideration the nature [317] and extent of defendant's injuries, whether the same are temporary or permanent in nature, the extent of disability, both mental and physical, if any, which the defendant will continue to suffer, his loss of earning power, if any, and such loss of bodily function, if any, that defendant, Page has sustained.

Instruction No. 38

Neither the allegations of the complaint or the counterclaim as to the amount of damage any party claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in a party's pleading does fix a maximum limit, and you are not permitted to award such party more than that amount.

Instruction No. 39

You are not, in ascertaining the amount of damages, if any, to resort to the pooling plan or scheme, which has sometimes been adopted by juries for such purpose. That plan or scheme is where each juror writes the amount to which he considers a party is entitled, and the amounts so written are added together, and the total divided by twelve. This is a scheme of chance, and no element of chance may enter into your verdict or into the determination of any question necessary thereto. [318]

Instruction No. 40

You are not permitted to award a party speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative.

However, should you determine that a party is entitled to recover, you should compensate him for prospective detriment if it has been shown by a preponderance of the evidence that there is such a degree of probability of that detriment occurring as amounts to a reasonable certainty that it will result from the original injury.

Instruction No. 41

There is a restricted significance of evidence as to life expectancy. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete, but only a limited, record

of experience. Therefore, the inference that may be drawn from life expectancy tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activities of the person whose life expectancy is in question. [319]

Instruction No. 42

According to the American Table of Mortality, the expectancy of life for persons of the ages indicated below are as follows:

Age of Person	Expectancy of Life
66 John A. Duff	10.54
61 Jennie R. Duff	13.47
58 Elizabeth Bronson	15.39
56 H. L. Page	16.72

The above facts, of which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if you find any of the above persons are entitled to a verdict.

Instruction No. 43

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages and the fact that they have been given to you must not be considered as intimating any view

of my own on the issue of liability or as to which party is entitled to your verdict.

Instruction No. 44

You are instructed that the parties have stipulated that the items of expense such as hospital, doctor, repair, and [320] traveling expenses were necessarily incurred, and that such items are reasonable, however, no party stipulates as to general damages such as pain and suffering, physical disability or loss of a wife's services by her husband, which amounts, if any, are left solely for your discretion under the instructions given.

These stipulations were made by counsel to conserve time and by entering into the same, no party admits liability for any item of damage.

Instruction No. 45

You are instructed that your verdict must be based solely and exclusively upon the evidence in the case. You should not be governed by passion, prejudice, sympathy or any motive whatever, except fair and impartial consideration of the evidence, and you must not under any circumstances allow any sympathy which you may have or entertain for the plaintiffs or defendant to influence you in any degree whatsoever in arriving at your verdict. The Court does not charge you not to sympathize with the plaintiffs, or with defendant, because it is only natural and human to sympathize with persons who have sustained loss, affliction or misfortune, but the Court does charge you not to

allow that sympathy to enter into your consideration of the case or to influence your verdict.

Instruction No. 46

If in these instructions, any rule, direction or idea [321] is stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and to regard each in the light of all the others.

Instruction No. 47

The attorneys have discussed the law during the course of their respective arguments. They had a perfect right to do this. I would caution you, however, that you must look to these instructions and nowhere else for the law that will guide you in your deliberations in this trial. If the attorneys, or any one else, have suggested, or if any of you believe that the law is other than it is given to you in these instructions, I charge you that you must be guided by the rules of law given to you in these instructions to the complete exclusion of any other suggested, or otherwise apparent rules of law.

Instruction No. 48

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you I say that you must decide the case for yourself, but you should do

so only after a consideration of the case with your fellow jurors, and you should not hesitate to change [322] an opinion when convinced that it is erroneous. However, none of you should vote in any manner nor be influenced in so voting for the single reason that a majority of the jurors are in favor of a particular verdict. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict, or solely because of the opinion of the other jurors.

Instruction No. 49

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claim or position of either party, you will not suffer yourselves to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

Instruction No. 50

At times throughout the trial the Court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is

admissible is [323] purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

Instruction No. 51

Upon retiring to the jury room you will select one of your number to act as your foreman or forelady who will preside over your deliberations and who will sign any verdict to which all of you agree. It will be the duty of the one so selected to serve as your spokesman in any further proceedings in this court.

The person selected to act as foreman or forelady of the jury should permit a full and free discussion of the case by the jurors in the jury room. The other jurors should assist the foreman or forelady so selected in keeping the proceedings orderly and expediting the proceedings of the jury in the jury room.

If you desire to see any of the exhibits that have been introduced in evidence, you may advise the marshal of that fact and the exhibits that you wish to see will be delivered to you in the jury room.

If it should become necessary for you to communicate with the Court on any matter connected

with the case while you are deliberating, I admonish you that you must not disclose to the Court how you stand numerically, or otherwise, and this admonition you should adhere to until the jury has reached a verdict.

It will take all twelve of you to reach a verdict. When all twelve of you have agreed upon a verdict, that is the verdict of the jury.

There has been prepared for your convenience forms of verdict. These forms of verdict have no significance in and of themselves and are not to be considered by you for any purpose other than as a convenience for your use. When you have reached your verdict, which must, as I have already told you, be unanimous, your foreman or forelady should complete the appropriate verdict form and sign it. You should then return the same to the Court. [325]

DEFENDANT'S REQUESTED INSTRUCTIONS REFUSED BY THE COURT

Instruction No. 1

You are instructed to return a verdict for the defendant, H. L. Page, and against the plaintiffs, John A. Duff, Jennie R. Duff and Elizabeth Bronson, No Cause of Action.

Instruction No. 2

You are instructed to return a verdict for the defendant, H. L. Page, and against the plaintiff, John A. Duff, No Cause of Action.

Instruction No. 3

You are instructed to return a verdict for the defendant, H. L. Page, and against the plaintiff, Jennie R. Duff, No Cause of Action.

Instruction No. 4

You are instructed to return a verdict for the defendant, H. L. Page, and against the plaintiff, Elizabeth Bronson, No Cause of Action.

Instruction No. 8(b)

Inasmuch as two of the plaintiffs in this action, namely, John Duff and Jennie R. Duff, are husband and wife, if you should find that Mr. Duff was negligent and that such negligence contributed as a proximate cause of the accident, then Mrs. Duff [326] can not recover, although she may have been wholly innocent of any negligent conduct.

Instruction No. 11

You are instructed that it was the duty of the plaintiff, John A. Duff, to keep a reasonable and adequate lookout for vehicles upon the highway in front of him, it was no legal excuse for the plaintiff, John A. Duff, to say that he did not see, if by reasonable care he could have seen. In other words, the plaintiff, John A. Duff, was required as a matter of law to see what could have been seen, and if he did not see the defendant's wrecker at a time when he should have seen it, in the exercise of reasonable care, then he was negligent, and if you find that such negligence, if any, was the sole

proximate cause of said collision, then plaintiffs can not recover, and your verdict should be in favor of the defendant, No Cause of Action.

Instruction No. 12

You are instructed that if the plaintiff, John A. Duff, could, in the exercise of reasonable care, have avoided the collision by keeping a proper lookout, by slowing down or turning out and around defendant's wrecker, or by any other reasonable means, then it was his duty to do so, and if you find that the plaintiff, John A. Duff, was negligent in any of said particulars and that such negligence, if any, was the sole cause of said accident and resulting injuries sustained by [327] plaintiffs, then plaintiffs can not recover damages, and your verdict must be in favor of the defendant, H. L. Page, and against the plaintiffs, No Cause of Action.

Instruction No. 13

You are instructed in arriving at your verdict that you should disregard any oral testimony which is inconsistent with the undisputed physical facts in evidence. [328]

PLAINTIFFS' REQUESTED INSTRUCTIONS REFUSED BY THE COURT

Instruction No. A

The plaintiffs have the right and the law encourages them to join their actions. You are to determine the rights of each plaintiff to recover as though each case was a separate action. In this con-

nection you should apply the law and facts to each case, separately, without regard to the other cases.

Instruction No. B

The plaintiff, John A. Duff, is entitled to recover damages from the defendant, H. L. Page, if you find from a preponderance of the evidence, that the defendant, H. L. Page, was negligent and such negligence proximately caused any injuries of the plaintiff, John A. Duff; provided, however, if you further find from a preponderance of the evidence, that plaintiff, John A. Duff, was negligent and such negligence proximately caused or contributed to his injuries, then he can not recover against the defendant, H. L. Page.

Instruction No. C

The plaintiff, Elizabeth Bronson, is entitled to recover damages from the defendant, H. L. Page, if you find, from a preponderance of the evidence, that said defendant was negligent and such negligence proximately caused or contributed to any injuries of the plaintiff, Elizabeth Bronson; provided, however, if you further find from a preponderance of the [329] evidence, that plaintiff, Elizabeth Bronson, was negligent and such negligence proximately caused or contributed to her injuries, then she can not recover against the defendant, H. L. Page.

Instruction No. D

The plaintiff, Jennie R. Duff, is entitled to recover damages from the defendant, H. L. Page, if

you find, from a preponderance of the evidence, that said defendant was negligent and such negligence proximately caused or contributed to any injuries of the plaintiff, Jennie R. Duff; provided, however, if you further find from a preponderance of the evidence that plaintiff, Jennie R. Duff, was negligent and such negligence proximately caused or contributed to her injuries, then she can not recover against the defendant, H. L. Page.

Instruction No. E

If the negligence of two or more persons acting jointly or severally proximately contributes to the injuries of a person, without negligence on the part of the injured person, then either of such persons is liable to the person injured. This is true regardless of the relative degree of the contribution.

It is no defense for one of such persons that some other person, not joined as a defendant in the action, participated in causing the injury. [330]

Instruction No. F

You are instructed that the mere omission of a third person to interrupt the result of a defendant's act will not amount to an intervening efficient cause.

If you find that the defendant, H. L. Page, was negligent and that such negligence proximately caused or contributed to the injuries of the plaintiff, Jennie R. Duff, or to the injuries of the plaintiff, Elizabeth Bronson, then the omission, if any, of plaintiff, John A. Duff, to avoid the parked truck of the defendant, H. L. Page, is not an inter-

vening efficient cause, and does not break the causal connection between defendant's act and the injury to said Jennie R. Duff or Elizabeth Bronson.

Instruction No. G

You are instructed that a wrecker truck or tow truck is not an emergency vehicle.

Instruction No. H

You are instructed that the operator of a tow truck must use ordinary care in using the highway in towing a vehicle from off the road onto the highway. He must comply with Section 4365 of the Nevada Compiled Laws, and where ordinary care requires, he must put out a flagman, flares or other warning.

Instruction No. I

You are instructed that the Laws of Nevada, Section 4365 of the Nevada Compiled Laws, provide as follows: [331]

"No person shall stop an automobile, nor permit it to remain standing, on the main traveled portion of any highway for a length of time greater than is reasonably required to make adjustments or repairs; provided, that where there is room to make such adjustments or repairs the motor vehicle shall be driven entirely off the main traveled portion of the highway."

You are instructed that the above law applies to trucks or tow trucks.

In weighing the evidence in this case, you will be guided by a rule now to be stated: When it has been established by the evidence that a person did stop, or leave standing, any vehicle upon the main

traveled portion of a highway, and that at such place there was room to have parked said vehicle off of the main traveled portion of the highway, then such evidence is a *prima facie* showing of negligence on the part of the person so handling the vehicle and will support a finding that he was negligent in such conduct, unless that showing, together with any other proved facts that support it, fails to preponderate over evidence that it was impracticable to stop, park or leave the vehicle off the main traveled portion of the highway.

In other words, the law places upon a person who stops a vehicle on a main traveled portion of a highway, the risk of being found to have been negligent in so doing, unless he affirmatively shows the impracticability or the impossibility, just mentioned, of handling the vehicle otherwise. [332]

Instruction No. J

The operator of a motor vehicle is required to use ordinary care in keeping a lookout to see that which is plainly or clearly visible. When there is evidence to the effect that one did look, but did not see that which was in plain or clear sight, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive.

Whether an object is clearly or plainly visible is a question of fact to be determined from all of the surrounding circumstances.

Instruction No. K

The defendant has alleged that both the plaintiff, John A. Duff, driver of the De Soto automobile

involved in the accident, and the plaintiffs, Jennie R. Duff and Elizabeth Bronson, who were riders, were guilty of contributory negligence. The evidence that has been received bearing on the conduct of the driver must, of course, be considered by you in determining whether or not he was negligent and if so, whether or not his negligence contributed in any degree as a proximate cause of any injury to himself. Evidence of the conduct of the driver must be considered also as one of the factors of all the circumstances from which you will determine what happened, how it happened, and who, if any one, is responsible in damages. But you must not permit the evidence bearing on the [333] driver's conduct, or the comment of counsel concerning it, or your consideration of it, to direct your attention away from the rule of law previously stated to you, namely, the rule that if plaintiffs, Jennie R. Duff and Elizabeth Bronson, otherwise have a cause of action against the defendant, the same shall not be barred by any negligence, if any, on the part of the driver, John A. Duff. However, you are reminded that if either plaintiff, Jennie R. Duff or Elizabeth Bronson, herself was guilty of contributory negligence, she may not recover.

Instruction No. L

A plaintiff passenger in an automobile is entitled to trust the vigilance and skill of her driver unless she knows from past experience or from the manner in which the car is being driven on the particular trip, that the driver is likely to be inat-

tentive or careless. In absence of such knowledge, the passenger may take her attention off the road to look at scenery or may turn around to speak to a fellow passenger or she may go to sleep, without being chargeable with contributory negligence.

Instruction No. M

The rider in a vehicle being driven by another has the duty to exercise ordinary care for her own safety. This duty, however, does not necessarily require the rider to interfere in any way with the handling of the vehicle by the driver or to give the driver advice, instructions, warnings or [334] protests. Indeed, it would be possible for a rider to commit negligence by interfering with or disturbing the driver.

In the absence of indications to the contrary, either apparent to the rider or that would be apparent to her in the exercise of ordinary care, the rider has a right to assume that the driver will operate the vehicle with ordinary care. However, due care generally requires of the rider that she protest against obvious negligence of the driver, if she has reasonable opportunity to do so.

But the manner in which the rider must conduct herself to comply with the duty to exercise ordinary care depends on the particular circumstances of each case; and in the light of all those circumstances, the jury must determine whether or not the rider acted as a person of ordinary prudence.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

TESTIMONY OF WILLIAM L. BELLINGER

November 9, 1955

Direct Examination

Q. (By Mr. Wright): Your name is W. L. Bellinger? A. Yes sir.

Q. You live in Elko, Nevada? A. Yes sir.

Q. Your specific address, please.

A. My address is 649 Oak Street.

Q. How long have you lived there at that same address?

A. At that same address since 1935.

Q. Are you the owner and operator, along with your wife, of a garage in Elko, Nevada?

A. Yes sir.

Q. And the garage is known as what? [1]

A. Bellinger Motor Company.

Q. Situated where?

A. 608 Commercial Street.

Q. That is across from the Southern Pacific tracks, going south? A. Yes sir.

Q. How long have you operated the Bellinger Motor Company at that same address in Elko, Nevada? A. Since 1943.

Q. Were you in the garage mechanical business before 1943? A. Yes sir.

Q. What type of business, what kind, did you have before 1943?

A. I had a garage on 5th Street.

(Testimony of William L. Bellinger.)

Q. Well, just generally you were in the garage business? A. Yes.

Q. How long have you been operating a garage business? A. Since 1932.

Q. Are you also a mechanic? Do you do mechanical work, or just a boss and let the other fellows do it?

A. I do a lot of mechanical work.

Q. In connection with that garage, do you operate a tow car or wrecker? A. I do.

Q. How long have you operated a tow wrecker?

A. I have had a wrecker of my own since 1943.

Q. Have you operated that wrecker of your own continuously from 1943 up to and including the present time? A. Yes sir. [2]

Q. Have you ever taken the wrecker out on U. S. 40 between Elko and Wells; that is, you, yourself? A. Yes, many times.

Q. Who usually operates the wrecker truck?

A. I usually operate it.

Q. How far have you gone eastward from Elko, Nevada, on U. S. 40?

A. I have gone as far as Wendover.

Q. Then 93 out of Wells, that goes towards Contact and towards Ely, does it? A. Yes sir.

Q. Have you ever operated on that road?

A. Yes sir.

Q. How far north towards Contact and how far towards Ely?

A. Well, not too far north; possibly ten miles.

(Testimony of William L. Bellinger.)

Q. And then I take it you have gone west from Elko, Nevada? A. Yes sir.

Q. Then also around the Elko area too?

A. Yes sir.

Q. Now on December 31, 1954—just answer this question yes or no—was there a custom existing with reference to towage of vehicles on the road, back on to the road, in the vicinity of Wells, Nevada on U. S. 40 and towards Elko, Nevada, and especially in the area from Wells down say 14, 15, 20 miles?

Mr. Hanson: Just a moment. We object as being incompetent, irrelevant and immaterial; also not specific as to [3] what he means by custom. I think custom has no bearing on the issue of negligence one way or the other and custom must be widespread. We object to the question, as calling for conclusions without proper foundation.

Mr. Wright: I merely asked him if there was and I will go into the other matters.

The Court: Objection sustained.

Mr. Wright: If the Court please, I wanted to ask him some questions in connection with that matter.

The Court: Ask the other questions and counsel can make objection.

Q. Do you know of any custom existing in connection with towage that is a wrecker operating, pulling a car or a trailer on to the highway as to putting out in the daytime any flares or flags or any type of warning? Just answer that yes or no.

(Testimony of William L. Bellinger.)

Do you know of a custom existing?

A. Yes sir.

Q. Now tell us—and I have reference to the area of U. S. 40 or Wells westward, which would include at least 10 or 14 miles west of Wells, Nevada—did that custom exist as to that area of U. S. 40—

Mr. Hanson: Just a moment. We object to the question at this time on the ground that no proper foundation here there was any custom. All the witness testified to he knew one existed. There might be a serious question whether or not it was custom or individual practice. Objected to as irrelevant and [4] immaterial and no proper foundation.

The Court: I am going to save time by saying I will rule out anything about custom. If I am wrong, I will rescind that later.

Mr. Wright: I have some other questions and then I want, in the absence of the jury, to make an offer of proof.

The Court: Yes, certainly.

Q. Now, Mr. Bellinger, are you acquainted with the mechanical operation of bringing a car when it is turned on its side and off its shoulder, putting the car on its wheels, the mechanical operation of using the tow car in doing that job?

Mr. Hanson: Objected to as incompetent, irrelevant, and immaterial, unless the essential operation would be the same as the day of the accident and done under similar conditions.

Mr. Wright: This is only preliminary and then

(Testimony of William L. Bellinger.)

I will ask a hypothetical question. If he was acquainted with the mechanical features.

Mr. Hanson: Objected to as no foundation for hypothetical question and upon the further grounds, I think the question——

The Court: Objection sustained.

Q. Now, Mr. Bellinger, assume that there was a highway which was a black asphalt surface, with a white stripe in the approximate center, so that on one side there was a distance of 11 feet——

The Court: 14 on one side and hard top, 15 on the other.

Q. ——Yes, and then one shoulder there was approximately 7 feet [5] on the other shoulder there was about 4½ feet of the gravel, with oil spilled over the top, and then a further shoulder going away from the pavement of about 3½ feet. Now assume that that highway was covered with an icy condition approximately a quarter to half an inch thick and that there was also ice on the shoulder; that a vehicle, being a Ford vehicle, has gone off the road and attached to it was a U-Haul trailer and the U-Haul trailer being of the size depicted in a picture shown in plaintiffs' Exhibit No. 8 and that the Ford car is in the approximate position that I am pointing on the blackboard and it is marked the word "Ford" on the parallelogram, and then attached to it is that trailer that you see in that same picture I exhibited to you. The trailer is attached to the Ford car by means of a tongue about four feet, turned over on its right side; that

(Testimony of William L. Bellinger.)

the trailer is off the shoulder of the road and pointed at this angle that you see on the blackboard, and assume that this is the center of the highway, as shown in this diagram and that the condition of the road is as I described, and that it is in the daytime, approximately ten o'clock in the morning; there is a cloudy condition, but clear atmosphere, and that the tow truck weighs approximately $7\frac{1}{2}$ tons, with the truck and plus its tow equipment, dual wheels in the back, single wheels in front, that there are two booms which swing around from the rear, so that both will swing—they make a 360 degree angle—and that tow truck is similar to the tow truck that is described in defendant's Exhibit A, which I showed you a picture of; there is a [6] power winch on the tow truck and the cable runs through the boom. Now can you tell us what position—and assume that it is determined that it is necessary to put the trailer on its wheels that it is turned over on its right side; that the highway is a straight road, as exhibited in plaintiff's Exhibit No. 12, which I now show you, can you tell us where the wrecker could be set to put the trailer on its wheels?

Mr. Hanson: Now, if your Honor please, we object to that question on the ground it does not contain all the elements of a hypothetical question. It does not show anything about the condition of the terrain, where the trailer was or the Ford car was; no information as to time or condition in the highway of the area where the Ford trailer was,

(Testimony of William L. Bellinger.)

no evidence as to the weight of the trailer; I mean that isn't included in the question and the main question calls for a subject not a proper subject for expert testimony; in fact, it invites this man to pass on the very question the jury is to pass on. One of the ultimate facts in this case is whether or not the defendant was negligent in the way he performed that operation; and we object on the further ground the evidence shows conclusively that the trailer had been righted at the time the accident had occurred, so we are not concerned with righting of the trailer, that had already been done, that operation completed before the accident happened, so any testimony as to righting the trailer, it would seem to us to be immaterial and not relevant.

The Court: Objection sustained. [7]

Mr. Wright: If the Court please, might I amend that hypothetical question to include that the grade of the road is 3.34 per cent grade from the top of the hill downward and where the vehicle had gone off the road, the trailer and the Ford, that the same grade existed there, 3.34 per cent.

Mr. Hanson: The same objection, if your Honor please.

The Court: Same ruling.

Mr. Wright: May I, out of the presence of the jury, make an offer of proof on that phase of it?

The Court: The jury will be excused while this offer is being made.

(Testimony of William L. Bellinger.)

In the Absence of the Jury

Mr. Wright: If the Court please, with reference to my first phase of the question, as to the custom and practice, we offer to show by this witness that he is acquainted with the custom of towing and that, second, there is a custom of towing that exists on U. S. 40 and in the vicinity of 14 miles west of Wells, Nevada, on U. S. 40; that the custom is general; that this witness has operated the business during that period of time; that he stated from 1943, I believe, he has operated a wrecker himself on those highways, that he has pulled wreckers out from different vicinities and also that he has pulled out wrecks in this particular area. He is acquainted with the hill, he has been over it, he has looked at it, seen that that is the [8] operating custom that is done, he has talked with many of the operators, he has seen them operate and observed the practice and custom of operation in pulling wrecks on to the highway, and also the custom with reference to the use of warnings. First, as to custom. One custom is if it is possible to do the work off the entire road, that practice and custom is that the wrecker stays off the travelled portion or shoulder of the highway. Second, if he can not do the work there, *then the* that the custom is that the wrecker stays on the shoulder and if it stays on the shoulder, that warnings are put out on each side of the wrecker, consisting of flags or flares or road signs, "Danger", that they are put on each side of the wrecker and there is a custom

(Testimony of William L. Bellinger.)

that they have to take into consideration the hilly surface of the highway, whether it is curved or hills or brow of the hill. That put the trailer up on to the road, it can work on the shoulder and get on the pavement but must keep out the different flares as warnings. That the custom is that if there is a hill within a half mile, with ice or slippery, that warnings, consisting either of flares or signs similar to the "Danger Ahead" signs, or little flags or other warnings or flagman is placed upon the top of the hill where the vehicle can see it as it comes over the crest. That is the custom and practice that is recognized in that vicinity. Also that the practice is that where there is an icy surface, then you go farther away from the vehicle and if on the crown of a hill, you go farther away with the signs. In other words, before a vehicle [9] approaching comes to that point where there is a curve within a half mile or top of the hill within a half mile that is true.

Now with reference to the other feature of the mechanical operation we offer to show, with reference to a trailer off the road, which has first to be righted——

The Court: Now, Mr. Wright——

Mr. Wright: But the wrecker was not in the process of towing the trailer on to the highway. It hadn't started yet.

Mr. Hanson: It was just getting ready to, your Honor. I think Mr. Page testified to that.

The Court: It just isn't academically correct. It

(Testimony of William L. Bellinger.)

had already hooked up when this accident happened.

Mr. Wright: Yes, but they hadn't started yet to put the trailer up on to the highway. They had just done the preliminary work. For instance, like inspection. There is the preliminary step or preliminary matter of putting the towed car on its wheels. We are prepared to show, and the offer of proof is, that the wrecker could have remained on the shoulder, off the surface, he could attach the cable to the right corner when it is on its right side, by driving forward, pull it on its wheels or put the power on the winch, pull it over on its wheels. Also we are prepared to show that the next step, assuming that you have pulled the trailer back on to the highway, that it would not be necessary, nor was it practical, to push it in the form which this wrecker was setting, which is an angle, but it could have been done, and would be practical, to put the wrecker in a position of facing toward [10] the East, with its wheels entirely on the shoulder, or the right wheels on the edge of the pavement, hooking on to the rear of the trailer and then proceeding on parallel to the road eastward and pulling the trailer on to the highway in that fashion I have described by placing the tow wrecker on the blackboard, which indicated the road, in that manner. This wrecker would not have had to be on the road, or main travelled portion of the road, at all, and a brace could be put against the side of the wrecker—a very simple operation. These

(Testimony of William L. Bellinger.)

wreckers can pull out these Interstate Truck Line trucks on to the road, they are so powerful. We make that offer of proof.

Mr. Hanson: We object for the same reason. The wrecker used in the demonstration is not the same. The Page wrecker had two booms, and of course, our main objection goes to the fact there is no evidence showing this man saw what those conditions were there, no evidence where this trailer was or as to the weight of the trailer. It seems to me it is the foundation of the general rule that a witness, an expert or non-expert, can not give an opinion as to the ultimate fact which is to be decided by the Court or jury, whether a person was negligent or whether a structure was safe. There is a whole line of cases on that. I think that is the general rule.

As far as the custom is concerned, there is no evidence here of custom of wreckers from which the State of Nevada determines how you should act and what you should do and no [11] evidence if a person follows a certain custom, that would relieve him of liability if he violated the law. We do not contend that Mr. Wright can not argue all he wants to to the jury a man could have done this thing a different way, but to put this man and in effect ask him to testify on the very ultimate fact to be decided by the jury, he can not do that. We object on those grounds and the grounds heretofore mentioned.

Mr. Wright: May I be heard, your Honor? I

(Testimony of William L. Bellinger.)

think it is pretty well known where the statute says with reference to parking on the highway and that does not say anything about flares or flagging or anything of the customs that you might comply with, being off the road or the necessity as to whether or not you should put out flares or flagmen. The law requires ordinary care in that respect and also in cases where there is a question of custom or practice, that is admissible. We have some places where there is a custom existing, you must comply with the custom or practice existing and others are different, with reference to established custom or practice of putting out some warnings, flares, flagmen, road warning, something of that nature.

Then with reference to the mechanical operation, whether it could be done or could not be done, and whether possible or not possible, we feel that is a subject for expert testimony. Lay people do not know the mechanical operation of that.

The Court: That is true, but one does one way [12] and one another way. The ruling of the Court, therefore, remains the same.

Mr. Wright: I have no other questions of Mr. Bellinger.

TESTIMONY OF JOE MENDIVE

November 9, 1955

Direct Examination

Q. (By Mr. Wright): Your name is Joe Mendive?

A. Yes.

(Testimony of Joe Mendive.)

Q. For the sake of the record, how old are you?

A. Thirty-one.

Q. You live in Elko, Nevada? A. I do.

Q. You have lived in Elko, Nevada, I believe, all your life? A. I have.

Q. You work for the Warren Motor Company?

A. I do.

Q. That is the garage of the Ford Motor Company, or the dealer in Fords and Ford garage in Elko, Nevada? A. That is right.

Q. How long have you been working for the Warren Motor Company in Elko, Nevada?

A. Five years.

Q. What type of work have you been doing those five years?

A. Car repair and service, greasing, etc., and operating wrecker. [13]

Q. The Warren Motor Company has a wrecker, you say? A. Yes sir.

Q. How long have they had the wrecker, or has it been at least during the entire service of your work?

A. It has been there since I have been there.

Q. And you say you have operated the wrecker during that period of your employment?

A. Yes.

Q. You are acquainted, I take it, with U. S. 40 from Elko to Wells, are you not? A. Yes.

Q. And had you ever operated a wrecker over that stretch of road before December 31, 1954?

A. I have.

(Testimony of Joe Mendive.)

Q. Now calling your attention to December 31, 1954, do you recall receiving a call or notification to go to somewhere near Wells, Nevada, to answer a call concerning an automobile? A. Yes.

Q. Could you say about what time? Was it some passing motorist or what?

A. A motorist came through and requested that we go 33 miles east of Elko, between ten and ten thirty.

Q. Was it from information that you got that this motorist had travelled about 33 miles to Elko before he notified you?

A. Yes, the people that went off the road didn't realize they [14] were closer to Wells than Elko. They thought Elko was closer, consequently we got the first call.

Q. Then did you proceed with the Warren Motor Company wrecker towards Wells? A. I did.

Q. Anybody with you? A. No, by myself.

Q. And that wrecker, tell us whether it had dual wheels in back? A. F-5 Ford truck with duals.

Q. Has duals in back and single in the front, I take it? A. Yes.

Q. About how much did that wrecker weigh?

A. Approximately seven thousand pounds.

Q. That would be approximately about 3½ tons?

A. Yes, all equipped and everything.

Q. As you went on towards Wells, tell us the condition of the roads as you left, not every foot of the way, but just generally.

A. Slick all the way, icy.

(Testimony of Joe Mendive.)

Q. And when you got approximately 14 miles east of Elko, Nevada, how were the roads?

A. Still slick.

Q. Did you come upon a scene of some car that had gotten itself where it needed a towing job or something like that? Just answer yes or no. [15]

A. I did.

Q. About how far from Wells, Nevada, was that?

A. About 14 miles.

Q. And with reference to any hills, can you identify it? A. Yes, up a hill.

Q. Was it towards the bottom, in the middle, or upper portion of the hill?

A. Towards the bottom portion.

Q. When you arrived, you were coming from Elko going eastward towards Wells, Nevada, is that correct? A. Yes.

Q. Did you stop?

A. Stopped at the scene of the accident.

Q. And an accident had occurred?

A. Yes, sir.

Q. When you stopped, did you stop on your left-hand side, which would be the north side of the road, or your right-hand?

A. When I stopped, I pulled over across the north side, as far over as I could without going off the bank.

Q. You stopped then on your left side, which would be your north side, is that correct?

A. Yes, sir.

(Testimony of Joe Mendive.)

Q. Now when you stopped, where was it with reference to the scene of the accident?

A. Approximately parallel.

Q. How close with reference—— [16]

Mr. Hanson: Scene of the car or accident?

Q. Well, relating to the car that was off the road? A. About twelve feet.

Q. Now about what time did you arrive?

A. Approximately the hour was 11:30.

Q. In the morning? A. Yes, sir.

Q. And what automobiles did you notice?

A. I saw the DeSoto first and on pulling up to the side I noticed the Ford and trailer, which I originally came for.

Q. What kind of a trailer?

A. A U-Haul, National U-Haul.

Q. Did you see a wrecker known as the Page wrecker? A. No, sir, no wrecker there.

Q. Then later was there any ambulance came?

A. The ambulance came within ten minutes after the time I arrived there, about ten minutes.

Q. Then did you learn—was there anything to indicate an accident had occurred, or a collision had occurred?

Mr. Hanson: We can stipulate to that.

Mr. Wright: I am trying to bring out if he arrived after the collision.

A. Two truck drivers standing on the side of the road told me what happened. People were in this car, waiting for the ambulance.

Q. The people that were injured in the car? [17]

(Testimony of Joe Mendive.)

A. Yes, sir.

Q. And then you towed in one of the cars afterwards? A. Yes, sir.

Q. That was which one? A. The DeSoto.

Q. The '55 DeSoto? A. DeSoto, yes, sir.

Q. Did you get the name of the people involved, or the name of the owner of the DeSoto?

A. Yes, sir.

Q. When you stopped, where were the right wheels of your car with reference to the north side of the road?

Mr. Hanson: Objected to as immaterial.

The Court: I was just going to object myself, if you are going through with much of it.

Q. When you stopped, what did you do?

A. On arriving there, I seen what happened, so I struck two flares and went up west up the hill and put one and took the other up further, didn't get over the top, and coming back, the ambulance showed up.

Mr. Hanson: Objected to as immaterial, after the accident. I move to strike.

The Court: Granted. What this man did has no bearing on what may or may not be negligence.

Mr. Wright: That is true. It is only showing his [18] ability to observe the hill as he went up.

Q. Well, you say you went up the hill. Now did you observe the west slope of that hill from where you stopped, which you said was about opposite those vehicles. Did you observe that hill on the west slope, up towards the cars?

(Testimony of Joe Mendive.)

Mr. Hanson: We object—what he observed after the accident has no connection.

The Court: Counsel, we have exhibits in here which show the visual aspects of this area. It is true they were taken some time after the accident. We have parties who testified to the same thing. It seems to me this is cumulative.

Mr. Wright: I didn't want to lead the witness. I wanted to ask him about covering, if any, of the highway.

The Court: Whether or not there were any obstacles that would destroy vision?

Mr. Wright: No, as to what might cover that portion of the road, snow or ice.

The Court: Well, let us get going.

Q. As you approached the scene, and as you stopped and walked up the highway there, did you notice any ice or covering on the highway, and if so, what did you notice?

The Court: What was the condition of the highway, that is the proper question.

A. The condition of the highway was icy. [19]

Q. Can you say how far?

A. As far as I could see to the top of the hill.

Q. And then, of course, the ambulance arrived?

A. Yes, sir.

Q. And then you towed the vehicles out?

A. Yes, sir.

Q. And I think you said you towed the '55 DeSoto to Wells, Nevada? A. I did.

Q. When you arrived at Wells, Nevada, did you

(Testimony of Joe Mendive.)

see a tow wrecker—you took the '55 DeSoto automobile to the Page garage in Wells? A. I did.

Q. Are you acquainted with the Page Garage in Wells, Nevada? A. Yes, sir.

Q. When you took the '55 DeSoto up to the garage, did you see a wrecker there?

A. The Page wrecker was parked in front.

Q. And did you look at the wrecker?

A. I took a look as I went by and then pulled off. The left rear end was smashed in, of the fender.

Q. Did it have any wording on it to indicate it was the Page wrecker?

Mr. Hanson: Did you say wording?

Q. Or printed matter. Now, Mr. Mendive, what was the color of [20] that wrecker you saw?

A. It was two-tone, white on top, faded blue on the bottom.

Q. You say it was faded blue on the bottom?

A. Yes, sir.

Q. Did you tow the small U-Haul trailer from off the north shoulder back on to the highway?

A. I did. I put it across the road on the other side off the highway.

The Court: What do you mean across the road? Do you mean from the north to the south side?

A. North to the south side, sir.

Q. Now as you approached the disabled vehicles to the west of it, in that immediate area, what was the condition of the surface there?

A. I don't understand.

(Testimony of Joe Mendive.)

Q. As you approached within a half mile or mile of the disabled vehicles, as you came from Elko, going eastward, before you arrived there, what was the condition of the road surface?

A. It was icy.

Q. Tell us with reference to whether or not you were able to park on the north shoulder of the road.

A. I did.

Mr. Hanson: Objected to as irrelevant and incompetent and not bearing on the facts in this case.

The Court: Well, he answered. The witness said he did. [21]

Q. Mr. Mendive, you took in the DeSoto car, did you not, into Wells? A. I did.

Q. So necessarily, of course, you went over the road. About how long after you arrived that you took the DeSoto into Wells?

A. From the time I arrived until I got to Wells in three-quarters or an hour.

Q. About what time did you leave the scene with the DeSoto car. A. Near noon.

Q. As you went up over the hill, describe the condition you saw on top and the condition on into Wells.

Mr. Hanson: That was several hours after the accident happened. We object to it. It is immaterial and irrelevant. The condition might not be the same.

The Court: The witness has testified as to the condition at the scene of the accident. What the condition was into Wells past the accident, other

(Testimony of Joe Mendive.)

than the immediate area, it seems to me is immaterial.

Mr. Taber: Mr. Page has testified for a mile or a mile and a half east of the scene of the accident that the highway was packed with snow, with the exception of 100 to 200 feet and we deem it highly material, the condition of the highway from the scene of the accident on into Wells.

The Court: Well, I frankly think——

Mr. Hanson: It is two hours later. [22]

The Court: I am going to permit the question to be answered.

A. After you got over the top of the hill it was almost perfectly dry all the way into Wells, except for two little patches.

Cross Examination

Q. (By Mr. Hanson): You work for the Warren Motor Company in Elko? A. Yes, sir.

Q. You also have a wrecker service?

A. For three years.

Q. You compete with Mr. Page for service in that area? A. No, no competition in it.

Q. You both go out together?

A. We have our boundary limits as to where we go out.

Q. Was it thawing at all when you got on the scene? A. Yes, sir.

Q. You got there about 11:30?

A. As near as I can figure.

Q. And it was warming up at that time?

(Testimony of Joe Mendive.)

A. Yes, sir.

Q. You could see the wreck for how far before you got to it?

A. I could see it good pretty near a mile anyway.

Mr. Hanson: That's all.

Mr. Wright: No questions.

[Endorsed]: Filed April 30, 1956. [23]

[Endorsed]: No. 15186. United States Court of Appeals for the Ninth Circuit. Jennie R. Duff and Elizabeth Bronson, Appellants, vs. H. L. Page, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: July 11, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15186

JENNIE R. DUFF and ELIZABETH BRON-
SON, Appellants,

vs.

H. L. PAGE, Respondent.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL

Point I

The District Court erred in refusing to ask the Jurors if they owned any stocks or bonds in the American Casualty Co.

Point II

The District Court should have allowed appellants the right to get the full explanation from the witness, Earl Remington, concerning his opinion that Duff was driving too fast.

Point III

The District Court erred in refusing appellants the right to show that it was practicable to do the towing job without getting on the traveled portion of the highway and that appellee did not need to use so much of the highway.

Point IV

The District Court erred in refusing to admit

offered testimony as to the custom and usage of putting out flags and other warnings.

Point V

The District Court erred in giving Instructions No. 12 and No. 19, to which the appellants objected.

Point VI

The District Court erred in refusing to give the the appellants' offered instructions Nos. A to M, inclusive.

Point VII

The District Court erred in refusing to grant appellants' Motion to Strike the Appellee's Statement that the tow truck was an emergency vehicle.

Point VIII

There was insufficient evidence to justify any or all of the verdicts entered on November 15, 1955, and said Verdicts were against Law.

Point IX

The District Court erred in refusing to grant appellants' Motion for a New Trial, filed November 22, 1955.

WRIGHT & EARDLEY,

/s/ By ROSS P. EARDLEY,

Attorneys for Appellants.

Certificate of Mailing Attached.

[Endorsed]: Filed July 18, 1956. Paul P. O'Brien.

